THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 540
2021/856JR

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

Between

Environmental Trust Ireland

Applicant

And

An Bord Pleanála, Limerick City and County Council
Ireland and the Attorney General

Respondents

And

Cloncaragh Investments Ltd

Notice Party

Judgment of Mr Justice Holland delivered 3 October 2022

Contents

INTRODUCTION & BACKGROUND

Impugned Permission, Proposed Development, ETI, the Site and its Location

1. The Applicant ("ETI") seeks to quash a decision of the First Respondent ("the Board") dated 18 August 2021 granting planning permission ("the Impugned Permission") under the PDA 2000[1] and the 2016 Act[2] to the Notice Party ("Cloncaragh") for a Strategic Housing Development ("SHD" and the "Proposed Development") which may be fairly, if a little incompletely, described as demolition of various disused buildings on site and construction of a 7-storey over basement car park building of 60 Apartment/318 bedspaces of student accommodation and 30 build-to-let apartments on a 0.77 hectare brownfield site at Punches Cross, Limerick (the "Site") about 1.1km from Limerick City Centre and less than 300m from Mary Immaculate College. Cloncaragh's SHD Planning Application

1 Planning and Development Act 2000
2 Planning and Development (Housing) and Residential Tenancies Act 2016

was made on 30 April 2021. It was accompanied by various reports, plans, and particulars which I describe below.

2. ETI describes itself as an environmental protection NGO and, leaving aside the specifics of its grounds of challenge to the Impugned Permission, its counsel described its "*underlying concern*" as being that the Proposed Development will give rise to the discharge of on-Site pollutants to groundwater which will thereby reach and adversely impact on the Lower Shannon River SAC[3]. ETI made a submission to the Board in the planning process (the ETI "Submission") which I describe below.

3. The Board decided to grant the Impugned Permission "*generally in accordance with the inspector's recommendation*". This is not recorded in the Board's order but is recorded in its direction. So the Board's Inspector's reasoning may be imputed to the Board – see **Eoin Kelly**[4] to the effect that *"… the Board order and the board direction can be read with the Board inspector's report …"* and see also **Dublin Cycling**[5]. That formulation in the Board's direction suffices to record the adoption of the Inspector's report save to any extent that the Board's decision explicitly or by necessary implication differs from that report.[6]

4. For purposes of compliance with the Habitats Directive[7], Cloncaragh submitted an AA[8] Screening Report[9] and an NIS[10]. The Board conducted an AA Screening and concluded that AA was required having regard to the likelihood of significant effects on the Lower Shannon River SAC[11] (the "SAC"). (AA is sometimes termed "Stage 2 Appropriate Assessment" to distinguish it from Stage 1 AA Screening. To avoid confusion[12] I will refer simply to "AA" and "AA Screening" respectively).

5. As to AA, the Board:
- concluded that the information before it was adequate for AA purposes
- adopted the AA done in its Inspector's report
- concluded
  - beyond reasonable scientific doubt
  - based on a complete assessment of all aspects of the proposed development
  - that the proposed development, by itself or in combination with other plans or projects,

3 Special Area of Conservation designated as such for the habitats and species protection purposes of the Habitats Directive - Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended and as transposed by Part XAB PDA 2000. See S.177R PDA 2000

4 Kelly v An Bord Pleanála & Aldi [2019] IEHC 84 (High Court, Barniville J, 8 February 2019) §196

5 Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 (McDonald J, 19 November 2020) §60 - McDonald J said: "While the Board, in its order, did not expressly adopt the entirety of the inspector's report, it is clear from the Board Direction … that the Board decided to grant permission "generally in accordance with the Inspector's recommendation". In such circumstances, the decision by the Board to grant permission must be read in conjunction with the report of the inspector."

6 Monkstown Road Residents' Association v An Bord Pleanála and others including Lulani Dalguise Limited and Dún Laoghaire Rathdown County Council [2022] IEHC 318 §73 et seq

7 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended and as transposed by Part XAB PDA 2000

8 Appropriate Assessment by the Board within the meaning of the Habitats Directive and S.177R PDA 2000

9 For the purposes of S.177U PDA 2000

10 Natura Impact Statement' as described in S.177T PDA 2000. It is created by the intending developer to inform AA by the Board. It is a statement, for the purposes of Article 6 of the Habitats Directive, of the implications of a proposed development, on its own or in combination with other plans or projects, for one or more European site(s), in view of the conservation objectives of the site(s)

11 Special Area of Conservation designated as such for purposes of the Habitats Directive

12 The CJEU considers the AA to be Stage 1 and the project approval decision to be Stage 2 – e.g. Case C-441/17, Commission v Poland; 17 April 2018 §110

- would not adversely affect the integrity of European Sites[13] in view of their conservation objectives[14].

The Board did an EIA[15] Screening[16] and concluded that EIA was not required.

The Site

6. The Site is not entirely regularly shaped but can be thought of as roughly diamond-shaped, with its northern apex at Punches Cross[17] from which Rosbrien Road runs south east along the north east boundary of the Site and Ballinacurra Road/O'Connell Avenue runs south west along the north west boundary of the site. Cloncaragh's Groundwater Management Plan[18] by SLR Consulting[19] says[20] that, generally, the Site falls about 6m from north-west to south-east in accordance with the gradient of the local area. Dr Drew[21] appears to agree. However the URS Report 2013[22] has it sloping "*southwest along the general gradient of the surrounding land*". The proposed ground floor levels likewise fall, though less so, from 15.2m OD at the northern apex of the Site, to 14m OD at roughly the south eastern and south western apexes.

7. Again roughly describing matters, the western/north-western half of the Site was occupied by a petrol station from about 1960 to around 2007 – since when the petrol station has been disused[23] and largely demolished. Though the precise locational detail and timing are not entirely clear to me and do not matter, at least some of the Site was a quarry preceding the petrol station. The quarry was backfilled - such that much of the Site is made ground. Substantial disused buildings on Site remain for demolition. 4 underground oil storage tanks in the south/southwest of the site[24] ("the Tanks") are for removal – 4 others were removed about a decade ago.

8. Figure 2 below, from Cloncaragh's SHD planning application dated 30 April 2021 (the "Planning Application"), locates the site with reference to the Dooradoyle/Ballinacurra River, which runs from east to west/north west and discharges to the Shannon/Fergus estuary. Figure 2 depicts the SAC in the Shannon/Fergus estuary and the Dooradoyle/Ballinacurra river. It also depicts the River Fergus SPA[25] (the "SPA") but it did not feature in argument. At its nearest, the SAC is 1km southwest and/or west of the Site[26]. Figure 2 also depicts what Cloncaragh asserted in the Planning Application to be the groundwater flow direction from the Site southeast to discharge to the Dooradoyle River in excess of 500m from the Site.

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[13] i.e. SACs and SPAs - in substance in this case, the SAC.
14 European Sites are designated as such by reference to their specified "Qualifying Interests" – the habitats and species requiring protection. For the purposes of such protection "Conservation Objectives" are set particular to each site.
15 Environmental Impact Assessment within the meaning of the Environmental Impact Assessment Directive - Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 and within the meaning of Part X PDA 2000
16 Within the meaning of Part X PDA 2000.
17 See figure 1 below
[18] Groundwater Management Plan (Basement Construction Phase)
[19] Engineers to Cloncaragh
20 §3.1
21 Hydrologist and deponent for ETI – see below & §B1 of his report.
22 P7 – see below
23 See URS report September 2013 p13
24 As to location see the Technical Note: Water Environment Risk Assessment and the Groundwater Management Plan (Basement Construction Phase) Appendix 01
25 Special Protection Area designated a such for purposes of the Wild Birds Directive
26 Inspector's Report p85, 86 & 87

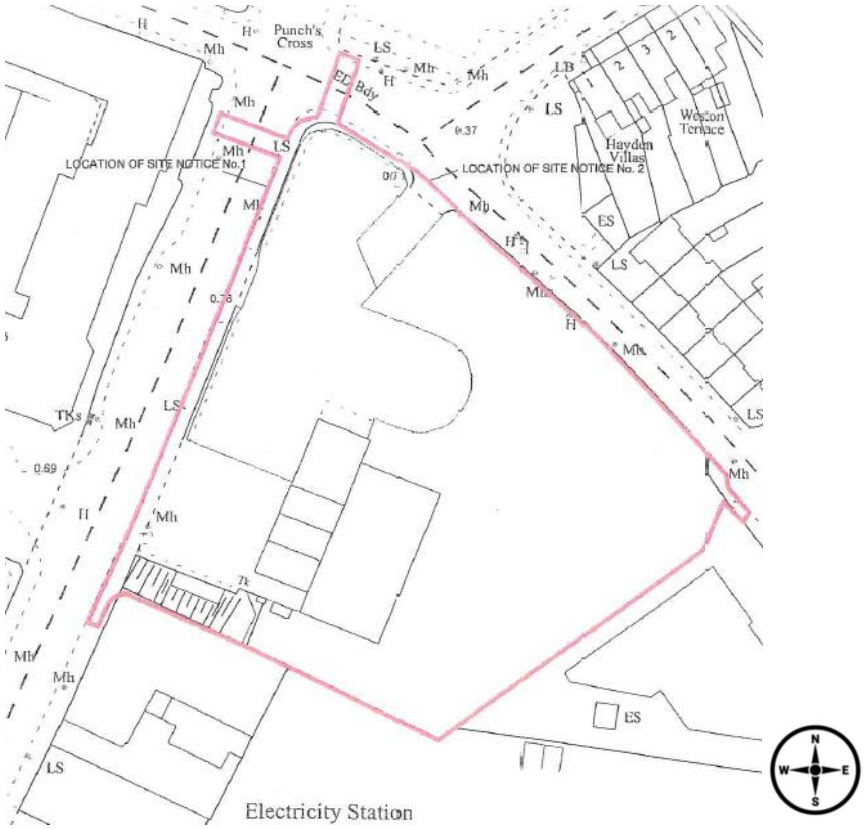

Figure 1 – extract from Planning Application Site Location Map

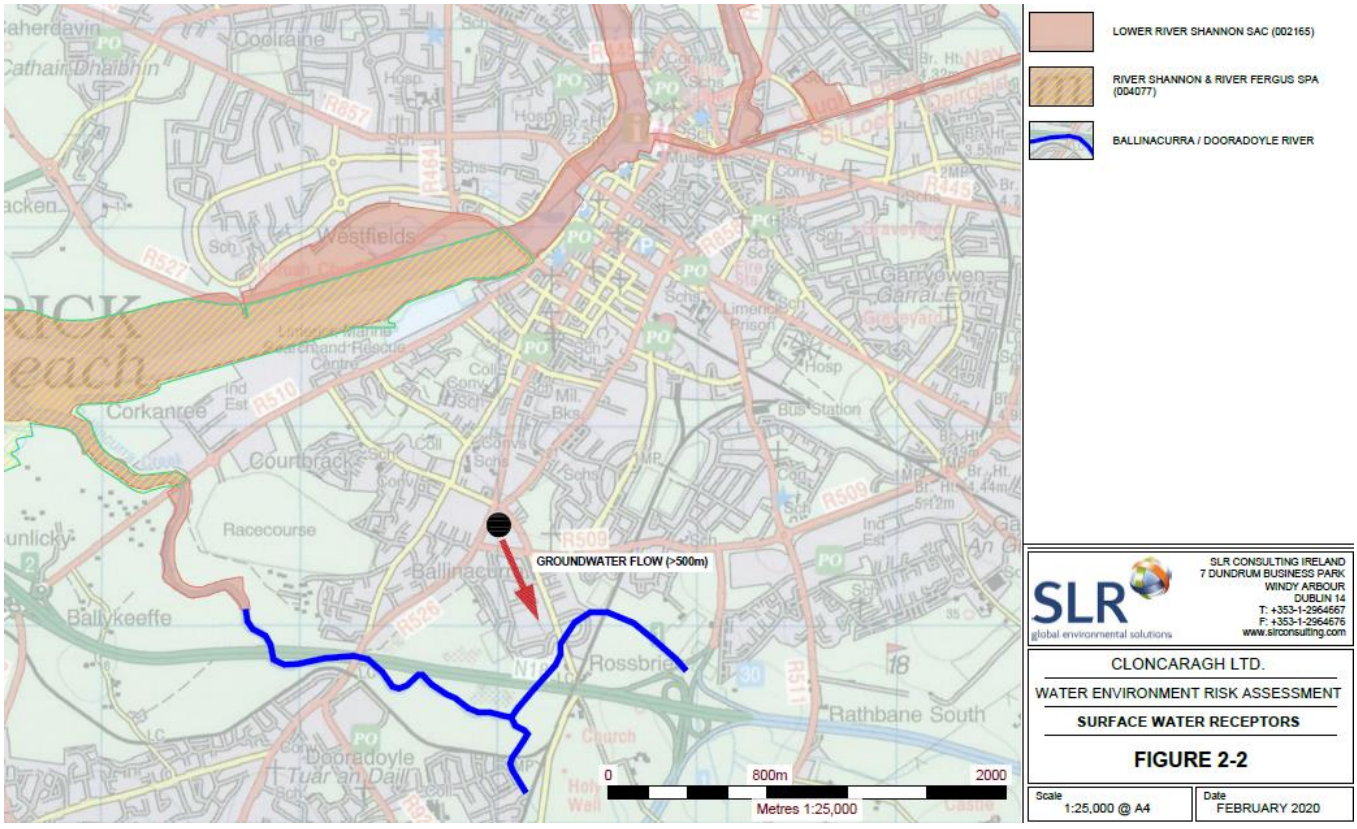

Figure 2 – extract from Planning Application/WERATN[27] Surface Water Receptors Figure 2.2

27 Water Environment Risk Assessment Technical Note

Grounds on Which Relief is Sought – Brief Summary

9. While leave to seek judicial review was granted[28] on wider grounds, and it will be necessary in due course to further consider the pleadings, by the end of the trial it was apparent that ETI relied only on three grounds of attack on the Impugned Permission as follows:

1. That the Board failed to circulate the ETI submission to the Second Respondent (the "Council").

2. That the drawings accompanying the Planning Application were not in accordance with Articles 297 and 298 PDR 2001[29]. Essentially, it is alleged that drawings were divergent and irreconcilable in that the engineer's drawings and accompanying reports and other engineer's documents proposed a basement car park Finished Floor Level ("FFL") of 11 metres above Ordnance Datum ("11m OD") whereas the equivalent figure in the architect's drawings was 10 metres above Ordnance Datum ("10m OD"). So, the architect showed the basement car park FFL a metre lower than did the engineer. The fact of the discrepancy is now admitted by all - but its legal significance is disputed.

3. That the AA done by the Board was invalidated[30] by gaps and lacunae, in that it failed to consider, adequately or at all, the alleged risk to the SAC posed by cement leaching from concrete to be poured in the construction works being carried from the Site by groundwater flow. In essence, two failures are asserted:
    - Failure to identify and consider the risk of cement entering the groundwater;
        - It is agreed that the Board did not identify and consider that risk but the question remains whether this absence represents a lacuna in the AA.
    - Failure to adequately identify hydrogeological pathways via which leached cement might travel from the Site to the SAC.

4. An allegation that the Board failed to comply with EIA screening requirements was not pursued – not because ETI considered it unviable but because ETI took the helpfully pragmatic view that if it failed on the AA point it would fail also on the EIA point[31].

Procedural History of the Judicial Review Proceedings[32]

5. Leave to seek judicial review was granted by order made on 18 October 2021. The Statement of Grounds inter alia sought to have quashed the Council's decision to approve the statutory report[33] of its Chief Executive to the Board dated 24 June 2021 in relation to the Planning Application (the "Chief Executive's Report"). On 18 October 2021, and on ETI's application, the claims for relief against the Council and the State were adjourned generally such that neither was served with the proceedings or required to file opposition papers. They have since played no part in the proceedings.

28 By order made 18 October 2021.
29 Planning and Development Regulations 2001 as amended
30 Contrary to S177V PDA 2000 as applied by the S.23 of the 2016 Act via S177R PDA 2000.
31 Day 2 p59 & 60 – references in footnotes in this and like form are to the transcript of the trial which has been made available to me.
32 The procedural history of the proceedings set out here is informed by a note thereof agreed by the parties.
33 Made pursuant to s.8(5) of the 2016 Act.

6. The Chief Executive's Report concluded that the proposed development was consistent with the applicable Development Plan and in accordance with the proper planning and sustainable development of the area. It is not entirely clear to me that there was such a decision and it may be that the proper relief, were any appropriate, would have been to simply quash the report itself[34]. But nothing turns on that, at least for now, as the case against the Council stands adjourned[35]. However, the Council's involvement in the process is important to Ground 1 as to the allegation of failure to circulate the ETI Submission to the Council.

7. At a Directions hearing on 4th April 2022 these proceedings, as against the Board only, were listed for hearing from 28th June 2022 and trial before me proceeded accordingly. At that Directions hearing, ETI raised no issue as to its case against the Council. On that occasion also, ETI was given liberty to issue a motion to cross-examine the Notice Party's deponents – such motion to be returnable for mention on 9th May 2022. ETI did not avail of that liberty – instead it filed the third affidavit of Michelle Hayes, sworn 29th April 2022.

2016 Act - Introductory Note

8. In very general terms, the purpose of the 2016 Act, as it relates to SHDs, can be described as a temporary[36] response to what has become generally known as the national "housing crisis" – a chronic deficiency in the national supply of housing. It applies to applications for planning permission for certain large residential developments – deemed SHDs by the 2016 Act - and the Proposed Development comes within the definition of an SHD[37]. The method of the Act is to expedite the SHD planning process by exceptionally providing that the planning application be made directly to the Board - as opposed to the normal process of application to the local planning authority with recourse to the Board only on appeal. This purpose is achieved in part also by a formal pre-application consultation process between the developer and the Board - such that the developer is expected to produce an "oven ready" development proposal in its planning application. This likely explains the omission of the "further information" process which adds to the duration of non-SHD planning applications. Importantly and doubtless as, unusually, the application is made directly to the Board, the 2016 Act requires the relevant planning authority to consider the planning application and submissions thereon and its Chief Executive to report to the Board on such consideration. Again in the cause of expedition, the SHD process is also characterised by strict deadlines applicable to the various steps in the process.

AA – the Basic Rule

9. While I will address the law later in this judgment, it is useful to recall, in reading what follows, the basic rule of AA as identified in the seminal **Waddenzee**[38] case:

34 As to quashing documents rather than decisions, see generally Protect East Meath Ltd v Meath County Council [2022] IEHC 395 §33
35 See further below
36 The SHD provisions of the 2016 Act have since expired.
37 S.3 2016 Act
38 Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee & Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, Judgment Of The Court (Grand Chamber) 7 September 2004
* Language

"The competent national authorities, taking account of the appropriate assessment of the implications of [the project] for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

As AG Kokott says in **Lies Craeynest**[39], this standard has the same effect as a presumption that projects adversely affect European Sites and so, in principle, should not therefore be implemented. That presumption can be refuted only by removing all reasonable scientific doubt.

While that presumption applies in the AA process before the Board, as will be seen, the position is more complex once the Board has made its decision and if the matter comes to judicial review.

Karstic and Fractured Limestone - a note[40]

10. Below the Site is a limestone aquifer[41]. The papers disclose dispute whether the limestone is karstic or is better described as fractured. Limestone is fractured by earth movement. Limestone is karstic where water erosion of pre-existing fractures has produced a network of enlarged channels. All agree this limestone is either one or the other – perhaps both. It is not clear to me that anything turns on this distinction for present purposes. Whether fractured or karstic or both, at least a possible effect is to direct groundwater flow in greater or lesser degree other than down the general gradient of the land and/or hydraulic gradient[42] of the water table in the area.

URS Closure Report 2013

11. In September 2013, URS Ireland Ltd ("URS") prepared an expert "closure" report on the petrol station to Esso[43] ("the URS Report") to provide a single point of reference for the investigation and validation work done to make the petrol station site suitable for future commercial use. It is in substance a collection or summary of 15 earlier reports[44] dated between 2005 and 2012. It records, inter alia:

- URS investigation, sampling and assessment of, and repeated reporting on, the Site since 2005, including as to risks to groundwater – which work is summarised.
- Decommissioning included site remediation, by reference to pollutant risk, supervised by URS. In the decommissioning 4 Tanks were removed – leaving in situ 4 Tanks which had been installed in 1959.
- A finding of no significant risk to "controlled waters"[45].
- That excavation works for redevelopment are likely to encounter visually impacted and odorous soils and shallow groundwater.

39 Case C-723/17; Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Others – Opinion of AG Kokott, 28 February 2019
40 See generally, "The Karst of Ireland" published by the Geological Survey of Ireland in 2000 which was exhibited in these proceedings. It is a short book for the general reader rather than a detailed or technical textbook. Also exhibited is a considerably more substantial and technical work: Drew, D. 2018. Karst of Ireland: Landscape Hydrogeology Methods. Published by Geological Survey Ireland.
41 An aquifer is a body of permeable rock, sand or gravel which can contain or transmit groundwater.
42 Water tends to find its own level. It does this by generally flowing from areas where its level is higher to those where its level is lower. The difference between these higher and lower levels is the hydraulic gradient.
43 Esso Ireland Ltd. Presumably the last operator of the petrol station.
44 Not to hand
45 As to the meaning of "controlled waters", see below.

- That, assuming a redeveloped site sealed by structural slabs, managed landscape and the like, contaminants are not a significant risk to commercial users.
- That the site is free of contaminants to the extent and degree necessary for commercial development.

12. However, the URS Report is, at least to the layperson, confusing as to groundwater flow direction. It says the site slopes "*southwest along the general gradient of the surrounding land*" [46]. In contrast, and as recorded above, the Groundwater Management Plan[47] in the Planning Application says that the Site generally falls to the south-east in accordance with the gradient of the local area, and Dr Drew[48] appears to agree. Disagreement on such a basic matter seems surprising. The URS Report states variously that inferred groundwater flow direction is "*to the west*[49] *and southwest*"[50] "*towards the south*"[51] and "*in the northern section of the site was towards the west*".[52] Figures 5 and 6 of the URS Report illustrate Conceptual Site Model sections on a north/northwest – south/southeast axis. But neither these figures nor the model they illustrate, nor the reason for the choice of axis, are referred to in the body of the URS Report[53]. The choice of axis appears to contrast with the Planning Application expectation of groundwater flow to the south-east[54].

13. The URS Report includes section drawings depicting sub-surface strata including made ground, till, weathered bedrock, limestone bedrock, groundwater level, and also depicting monitoring wells/boreholes, soil sampling trial pits and a "Non-Registered Groundwater Supply Well" over 250m southeast of the Site.

14. As Cloncaragh relies on it in the present process, I note that in the URS Report the conclusion of absence of significant risk to "controlled waters" is based on a "Controlled Waters Risk Assessment" by reference to "SSTLs"[55] – which I take to be related to hydrocarbons and other contaminants. Those SSTLs were calculated in contemplation of theoretical groundwater wells in shallow bedrock 100m from the site.[56] The URS Report lists an appendix: "*Controlled Waters Risk Assessment*". But I have not seen it and it is not apparent that the Board saw it, as the URS Report is exhibited three times in these proceedings, including by the Board, and no copy includes the appendices. What I take to be a summary of the Controlled Waters Risk Assessment appears in the URS report[57]. It records that SSTLs were set as "*protective of controlled waters*" but is unspecific as to the applicable standards and purposes of protection or how, if at all, they related to the conservation objectives of the European sites[58]. It concludes that no significant risks to controlled waters receptors exist. The URS Report does not identify what is meant by, and no one in these proceedings deposed to what is meant by, "*controlled waters*" which, as far as I am aware, is not a term of art at Irish Law. I am aware that it is a term defined in UK water pollution law and includes

46 P7 – see below
47 §3.1
48 Hydrologist and deponent for ETI – see below & §B1 of his report.
49 Groundwater contours and "*Inferred Groundwater Flow Direction*" to the west are illustrated on Figure 4.
50 P7
51 P21
52 P22
53 perhaps they are explained in the annexed Controlled Waters Risk Assessment but it is not apparent that it was before the Board - See below
54 See figure 2 above & Groundwater Management Plan §3.1
55 Site Specific Target Levels
56 See Technical Note: Water Environment Risk Assessment p5 & 10
57 P23
58 References to "European Sites" include the SAC and the SPA but for present purposes, only the SAC is in issue.

groundwaters, inland freshwaters and coastal waters[59]. It seems reasonable to conclude that the Controlled Waters Risk Assessment in this case was done by reference to the standards of applicable UK law. While I readily infer its possible relevance to informing AA, I cannot infer that a Controlled Waters Risk Assessment is intended to, or does directly, address requirements of Habitats Law. Certainly, the URS Report does not in terms mention or address Habitats Law issues, much less consider risk to the specific conservation interests of the SAC. I am unaware if the URS Report was proffered in the refused 2019 SHD planning application[60] and it was, no doubt properly and fairly, not proffered in the subject Planning Application by way of argument that AA was unnecessary.

2019 Refusal

15. The Inspector's report records that in 2019 a SHD planning application for 70 student apartments (326 bedspaces) and 30 build-to-rent apartments was refused ("the 2019 Refusal"[61]) for one reason only, relating to AA – which had been "screened out"[62] by the planning applicant such that no NIS was before the Board. That reason is set out in full in the Inspector's report in the present matter[63], as follows:

> *"The proposed development includes the excavation of c. 33,000m^3 of soil/ subsoil and removal of fuel tanks and hazardous substances. The site is located on lands where the groundwater is extremely vulnerable (www.gsi.ie[64]) and it is located c. 1km from the edge of the River Shannon and River Fergus Estuaries SPA …. and the Lower River Shannon SAC ……*
>
> *The submitted Screening for Appropriate Assessment has regard to the inclusion of mitigation measures to control silt/sedimentation and spillage of hazardous substances to prevent any likely significant impact on the groundwater pathways which provide a hydrological pathway for polluted water. Measures intended to avoid or prevent significant effects on a European site cannot be considered in screening for AA ……. Having regard to the inadequacy of information provided in the Screening Report, the nature of the proposed development, the misapplication of mitigation measures and the absence of a Natura Impact Statement, the Board could not be satisfied that a full understanding and analysis of the hydrological connectivity between the site with[65] the … River Shannon and River Fergus Estuaries SPA … and the Lower River Shannon SAC … and the potential implications of the proposed development on the groundwater quality has not[66] been undertaken.*
>
> *The Board therefore cannot be satisfied, beyond reasonable scientific doubt, that the proposed development, either individually or in combination with other plans and projects, would not adversely affect the integrity of River Shannon and River Fergus Estuaries SPA …… and the Lower River Shannon SAC ……. in view of the site's Conservation Objectives.*

59 S.104 of the UK Water Resources Act 1991.
60 See below
61 ABP 304705-19
62 i.e. an appropriate assessment screaming report submitted with the planning application had concluded that appropriate assessment was not required. The Board disagreed.
63 At §§4.0 & 11.2
64 GSI is Geological Survey Ireland, a division of the Department of the Environment, Climate and Communications.
65 Sic
66 Sic. The word "not" sits ill here but is as recorded in the Inspector's report. However, and given also the fact of the refusal of the Planning application on this ground, the thrust of the passage in question is clear to the effect that the hydrological connectivity between the site and the European Sites and the potential implications of the proposed development on groundwater quality had not been fully understood and analysed.

The proposed development would therefore be contrary to the proper planning and sustainable development of the area."

16. In addition, the AA section of the Inspector's report in the present matter records points of note from the Inspector's report which informed that earlier refusal, including:

- Bedrock near the surface of the Site and groundwater classified by GSI as highly vulnerable.
- History of hydrocarbon contamination.
- Proposed excavation and removal of c.33,000m^3 of soil/subsoil and 4 fuel Tanks to accommodate basement parking
- Serious concerns as to the impact of such extraction on water quality, *inter alia* by transfer of hydrocarbons and hazardous substances through percolation of the Site.
- A direct link from the Site to the European Sites.

Accordingly, the absence of an NIS precluded permission.

17. The Water Environment Risk Assessment Technical Note ("WERATN") submitted with the Planning Application records[67] further content of the 2019 Refusal as follows:

"The excavation of circa 33,000 m³ of soil/subsoil and removal of fuel tanks and hazardous substances on lands where the groundwater is extremely vulnerable, could result in a significant negative impact on the existing water quality of the [European Sites]."

"The proposed extraction of materials, in particular the fuel tanks have the potential to cause pollution via percolation and I have serious concerns relating to the impact on water quality, inter alia the transfer of hydrocarbons and hazardous substances through percolation of the site"[68]

Site Investigation Report – January 2020

18. A 2019 site investigation for Cloncaragh, by "IGSL" for Pierce McGann, Engineers, is described in a report dated January 2020 appended to the Civil Engineering Report of January 2021 submitted with the Planning Application. It is fair to regard it as supplemental to what was already known of the site from the URS report. IGSL drilled 8 boreholes, the records of which are provided, and describe the findings as to such as underground strata content, strength and groundwater levels. Samples were lab-tested for hydrocarbons – 3 exceeded the landfill waste acceptance criteria for inert material. Hydrocarbon odours were noted in several locations. Dr Drew, for ETI, is critical of this site investigation[69].

67 WERATN p4
68 sic
69 See below

WERATN[70] – January 2021

19. The WERATN is overtly prepared by SLR. It was in fact prepared by a hydrogeologist - though that became apparent only in proceedings. In light of the 2019 Refusal, it was prepared *"to address the risk to"* European Sites and to "*update*" the URS Report to that end. It is not apparent why it is a "Technical Note" rather than a "Report" or what such a distinction might imply, if anything, as to the status of the document or its content – but no point was taken in that regard.

20. The WERATN cites[71] verbatim relevant content of the Inspector's report and Board's decision in the 2019 planning refusal (some of which is set out above) and states[72] that the WERATN was prepared "*further to*" the "*considerations raised"* by the Board in that decision to address the risk to the European Sites. It identifies those matters as *"the potential risk to the* [European Sites] *from the excavation of soils, subsoils and fuel tanks at a location where the groundwater could be vulnerable."*[73] The inspector in the 2019 Refusal had noted[74] that the site was *"c 1km from the edge"* of the European Sites and considered that *"there is a hydrological pathway between the site and these European Sites via the groundwater"* and considered[75] also that there was "*a direct source-pathway-receptor linkage from the site to the River Shannon and River Fergus".* For reasons not apparent, the WERATN does not recite a significant element of the 2019 Refusal - that permission was refused as:

> *" … the Board could not be satisfied that a full understanding and analysis of the hydrological connectivity between the site with*[76] *the …* [European Sites] *… and the potential implications of the proposed development on the groundwater quality has not*[77] *been undertaken."*

But as that passage is recited in the present Inspector's report, the Board's awareness of it is clear.

21. The Conceptual Site Model used by the WERATN to analyse "*the different Source – Pathway*[78] *– Receptor linkages"*[79], and thereby risk[80], is said[81] to describe:

- *"the potential sources of contamination at a site*
- *the migration pathways it may follow*
- *and the receptors it could impact upon."*

It is said[82] to focus on the site-specific potential contamination and potential pathways.

22. The identified[83] potential groundwater contamination sources are essentially soils contaminated by hydrocarbons/chemicals in the vicinity of the Tanks.

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70 Water Environment Risk Assessment: Technical Note
71 P4 WERATN
72 P3 WERATN
73 P3 WERATN
74 §12.52 of that Inspector's report as cited at p4 WERATN.
75 §12.56 of that Inspector's report as cited at p4 WERATN.
76 sic
77 Sic. The word "not" sits ill here but is as recorded in the Inspector's report. However, and given also the fact of the refusal of the planning application on this ground, the thrust of the passage in question is clear to the effect that the hydrological connectivity between the site and the European Sites and the potential implications of the proposed development on groundwater quality had not been fully understood and analysed.
78 Pathways are the means by which a receptor is likely to come into contact with a source. – p10 of the WERATN.
79 p9 of the WERATN.
80 P11 of the WERATN.
81 P3 & p9 of the WERATN.
82 p9 of the WERATN.
83 P10 of the WERATN.

23. On foot of the 2019 site investigation, the WERATN infers[84] a steep water table gradient from borehole groundwater strikes noted at 1.3m bgl[85] on the northern boundary of the Site and at 5.1m bgl at the southern boundary – said to be consistent with the tabulated URS-reported groundwater levels[86]. Dr Drew thinks this unlikely.

24. The primary pathway identified[87] is the lateral flow[88] of that groundwater contamination from the Site through the weathered limestone aquifer. The WERATN identifies the Dooradoyle River as the[89] surface water receptor of groundwater flow as it is downgradient of the site. That river flows into the River Shannon. The WERATN states[90] that *"Groundwater flow direction in the limestone bedrock and overlying limestone gravel is expected to follow the topography towards the south east as shown on Figure 2-1"*[91] through the weathered limestone aquifer towards the Dooradoyle River at a point over 500m from the Site.[92] I understand this to mean that the groundwater flow will follow the inferred water table gradient in the same direction as the topography, southeast to the Dooradoyle River and thence via that river to the European Sites.

25. Though explicitly based on updating the URS report, the WERATN does not refer to or explain why the expected groundwater flow to the southeast, due to the steep hydrological gradient, differs from that expected by URS which inferred groundwater flow direction variously to the west, the southwest and the south but not to the southeast.[93]

26. It is said[94] that most groundwater flow is likely to take place in the top 30m approximately - in a weathered layer of a few metres (epikarst) and a connected fractured layer below it. Deeper groundwater flow occurs along fault zones and large fractures. The WERATN cites[95] the URS "*Controlled Waters Risk Assessment*" – which I have considered above.

27. Though not so entitled, what is clearly the conclusion of the WERATN is as follows[96]:

- The URS Controlled Water Risk Assessment shows that the groundwater results from the Site did not exceed SSTLs in the weathered bedrock strata 100m downgradient of the Site[97].
- These target levels will also be protective of the bedrock aquifer more than 500m downgradient of the site at the Dooradoyle River.
- Contaminant concentrations in the European Sites arising from the proposed development will be negligible due to:
  - The removal during construction of the contamination source (Tanks, contaminated soil and groundwater).

84 P6 of the WERATN
85 "below ground level". As ground level falls from north to south, the gradient may be steeper than these figures might superficially indicate
86 P7 of the WERATN
87 p10 of the WERATN
88 The WEATN says "migration".
89 The WERATN says "a" but as no other receptor is identified, "the" is appropriate.
90 WERATN §2.1.2 & 2.1.4
91 Figure 2.1 of the WERATN is consistent with Figure 2 of this judgment which is reproduced as Figure 2.2 of the of the WERATN
92 Pp5 & 8 & 10 & figure 2.2 of the WERATN. The topography is illustrated in Figure 2-1 of the WERATN.
93 See above
94 p5 of the WERATN
95 P10 of the WERATN
96 P12 of the WERATN
97 See also p5 of the WERATN.

- The Dooradoyle River is more than 500m downgradient of the Site in the direction of groundwater flow.
- It is assumed that the Dooradoyle River is in direct continuity with the weathered bedrock and that any potential contamination 500m downgradient of the site could reach the River.
- However, the ground conditions at the "GSI well" directly south of the Site and between it and the Dooradoyle River[98] indicate approximately 11m of overburden. The groundwater vulnerability classification also indicates more than 10m of moderately permeable subsoil. Therefore, it is highly unlikely that contamination from the Site has reached or will reach the Dooradoyle River via the bedrock aquifer.

- In the highly unlikely event that any contamination reaches the Dooradoyle River, an estimated dilution factor of over 1,000 would apply to any such contamination[99]. For the avoidance of doubt, and as there may have been some misunderstanding at trial, this dilution factor does not refer to dilution in the groundwater between the Site and the Dooradoyle River. It refers to dilution at entry of the groundwater plume into the River.
- A further dilution factor of over 2,900,000 would apply along the 2.3km stretch of River to the nearest European Site.[100]
- This clearly demonstrates that the risk of contamination from the Site affecting the European Sites is negligible.
- These conclusions are consistent with the conclusions of the URS Closure Report (2013): "*that currently no significant risks to controlled water receptors exist*".

28. Of the foregoing analysis I observe that:
- While it is correct to identify that removal of contaminants will decrease risk once the excavation is complete, it is their removal during excavation works that is identified in the WERATN[101] and by the Inspector in the 2019 Refusal[102] as posing the risk to European Sites.
- The analysis is predicated on expected groundwater flow to the southeast. The inconsistency of this expectation with apparently contrary views in the URS Report is not interrogated – a point made repeatedly in the ETI Submission to the Board[103] as a "fatal" and "major omission".

<u>Groundwater Management Plan (Basement Construction Phase) – January 2020</u>
("Groundwater Management Plan")

29. This was prepared by SLR – specifically by its Director (Geotechnical Engineering) and Technical Director (Hydrogeology; Risk Assessment & Retail Petrol Station Remediation). Its stated purpose[104] is to plan, inter alia, measures to ensure that groundwater (including potentially contaminated groundwater in the vicinity of the 4 Tanks to be removed) is collected, treated as required, and disposed of in a manner that does not affect the integrity of the European Sites.
30. Though they cover much of the same ground, the Groundwater Management Plan and the WERATN do not refer to each other. But they are consistent with each other. Like the WERATN, the

98 WERATN §2.15 & Figure 2-3 and Table 2-2.
99 WERATN Appendix 1 - in fact calculated at a factor of 1,292
100 WERATN Appendix 1 - In fact calculated at a factor of over 2,972,000
101 P4 - "The excavation of circa 33,000 m³ of soil/subsoil and removal of fuel tanks and hazardous substances on lands where the groundwater is extremely vulnerable, could result in a significant negative impact on the existing water quality of the [European Sites]".
102 See WERATN p4 - "The proposed extraction of materials, in particular the fuel tanks have the potential to cause pollution via percolation and I have serious concerns relating to the impact on water quality, inter alia the transfer of hydrocarbons and hazardous substances through percolation of the site".
103 pp5, 15, 34, 36, 42, 43 – see below
104 §1.2

Groundwater Management Plan states[105] that the topography, locally and on Site, falls from the north west to the south east towards the Dooradoyle River – "*Groundwater flow is expected to follow the topographic gradients, … underlying flow to the southeast*". Like the WERATN, it infers[106] a steep water table gradient from borehole groundwater strikes noted at 1.3m bgl on the northern boundary of the Site and at 5.1m bgl at the southern boundary. The Groundwater Management Plan records[107] the URS record of hydrocarbon contamination near the "*historical underground storage tank farm*".

31. The Groundwater Management Plan states as to "*Overall Approach to Groundwater Management – Basement Construction*"[108] and "*Groundwater Management Measures*"[109], that

- It envisages a *".. basement … formation level of 11mOD"*[110] - this is another way of referring to a Basement FFL of 11mOD[111]. From this the Groundwater Management Plan estimates basement excavation formation level at approximately 10mOD generally - in places lower to accommodate sewers and storm water attenuation tanks[112].

- *"This indicates a likely positive groundwater head of up to +2m in the north-western corner of the site above the base of the excavation, with the majority of the basement excavation above the average groundwater level suggesting a dry excavation. The groundwater will increase further for the localised areas of the site where the deeper stormwater attenuation tank will be constructed. This indicates that groundwater control will be required in localised areas of the basement in order to maintain a dry excavation and enable basement and drainage construction".* So, *"groundwater seepage will not be encountered across the majority of the excavation at elevations above 10mOD. However, groundwater seepages will be present in the north-western site. This coincides with the lowest 1m to 2m of the excavation in this area."*

- *"The perimeter of the basement excavation will be constructed using an interlocking secant pile wall system, seated into the underlying weathered limestone bedrock at depths greater than 5m as illustrated in Drawing 18.104-10 in Appendix 01, to ensure excavation side wall stability"*. Secant reinforced concrete piles will be designed and constructed around the site perimeter to an average depth of 4 metres below bedrock level and more than 4 metres below groundwater level[113]. *"The embedded secant pile wall will cut-off groundwater inflow from the Made Ground."*[114]
  - I reject any complaint of inadequacy of these details – both as to substance and as not pleaded[115].

- Given the small area requiring groundwater control[116], the potential vertical head pressures, the calculated possible groundwater flow rates into that area and therefore required drawdown[117] and pumping rates, and the duration of the programme, manageable volumes

105 §3.1
106 P9
107 P11
108 §4.1
109 §4.2
110 "mOD" means "metres above Ordnance Datum".
111 See for example Groundwater Management Plan Figure 4-1: Sketch Geological Cross Section.
112 Groundwater Management Plan Figure 4-1: Sketch Geological Cross Section
113 See Day 2 p113 & drawing at Construction Management Plan p 13
114 §4.2.1
115 See Day 2 p114 et seq
116 approximately 750m^2
117 approximately 1m

of water are likely to be generated and groundwater control via traditional in-excavation sump pumping would be suitable. A groundwater control trench or sumps in the bedrock can be made if required.

- A delineation borehole investigation of the area containing the Tanks to be removed will identify the extent of the contaminated soil. That area will be isolated by a local sheet pile wall before removal of the Tanks and any contaminated soils and groundwater beneath in a reduced level excavation - which will be at groundwater level and require groundwater control to allow dry excavation.

- Groundwater control will be by a specialist contractor and a qualified Environmental Consultant will manage the contaminated soil excavation.

- Soil sampling and analysis will validate complete removal of contaminated soil.

- A mobile treatment plant will treat contaminated soil and groundwater. It will typically reduce dissolved hydrocarbon concentrations to below laboratory limits of detection.

32. I accept that §4.2 of the Groundwater Management Plan, part of which I have cited above, describes the mitigation intended to ensure that the groundwater below the site will not be contaminated. The adequacy of that information is a matter for the Board who are entitled to at least some curial deference on that issue (see **Kemper**[118]), and to the extent it is in controversy between experts, there was no cross-examination on the issue.

AA Screening Report & NIS – January 2021

33. The AA Screening Report and NIS are conveniently combined in one document. They were, as is required, prepared by experts - whose expertise is not impugned. They were informed, inter alia, by the WERATN, the Groundwater Management Plan and other documents, which describe mitigation measures[119].

AA Screening Report

34. The AA Screening Report considers the possibility of risk to the SAC and SPA by release of pollutants to groundwater from contaminated soils during excavation and construction.[120] It does so specifically on foot of the WERATN, the conclusion of which it cites in extenso - and it concludes that *"while it is not considered likely to occur there is potential for contaminated groundwater to reach"* the European Sites.

35. The AA Screening Report considers that:

- It is clear from the WERATN that any effect on the SPA due to release of pollutants via groundwater is not likely to be appreciable. Effects on the SPA are not likely to be significant

118 Kemper v An Bord Pleanála [2020] IEHC 601 – see below.
119 I address some of these below in considering the inspector's report.
120 See pp14 & 15

based on the nature of the qualifying interests of the SPA and the sensitivity of these species and their supporting habitats to groundwater water pollution.

- While the WERATN considers the likelihood of contaminated groundwater reaching the SAC to be negligible, the significance of potential effects on the SAC is uncertain as some of the qualifying interests[121] may be affected indirectly through the potential for reduction in water quality.
- So AA is required, as to effects on the SAC, *"to facilitate provision of mitigation measures on a precautionary basis."* (Mitigation cannot be considered in AA Screening[122]).

36. The WERATIN conclusions informed the AA Screening to the effect that:

- In the highly unlikely event that any contamination reaches the Dooradoyle River, it is estimated that a dilution factor of over 1,000 would apply to any such contamination.
- A further dilution factor of over 2,900,000 would apply along the 2.3km stretch of River to the nearest European Site.

Despite that information as to dilution factors, AA was deemed necessary:

- because the significance of potential effects on the SAC was considered uncertain as some of the qualifying interests may be affected indirectly through the potential for reduction in water quality
- "*to facilitate provision of mitigation measures on a precautionary basis*."

So, the dilution factors by themselves did not enable screening out AA, and mitigation was necessary to the conclusion in AA set out in the NIS.

<u>NIS</u>

37. The NIS[123] provides supporting information to assist the Board determine in AA to whether the proposed development would adversely affect the integrity of the SAC. *"The focus is on demonstrating, with supporting evidence, that there will be no adverse effects on the integrity of the SAC. Where this is not the case, adverse effects must be assumed."* I do not suggest that, had it been pleaded, a challenge on this account would have succeeded but, in passing, I respectfully observe that the "*focus*" of an NIS should not be on "*demonstrating*" that "*there will be no adverse effects".* It should be on determining whether there will be adverse effects. The difference is of mindset in preparing a NIS.

38. It is recorded that the elements of the project likely to give rise to significant effects on the SAC are the excavation, removal and treatment of contaminated material from the Site, including the removal of the Tanks, and any potential migration of any groundwater pollution offsite to the SAC. The specific attributes and targets defining the conservation objectives for each qualifying interest of the SAC were reviewed and considered for the qualifying interest likely to be affected.

39. The WERATN is again described as finding that contaminant concentrations at the European Sites from the proposed development will be negligible based on an examination of the bedrock and

121 Not all – the qualifying interests are listed in Table 2 and the potential for adverse effect considered as to each. In most cases the possibility of adverse effect is excluded on the basis of distance from the Site.
122 See e.g. Highlands Residents Association v. An Bord Pleanala [2020] IEHC 622 (High Court (Judicial Review), McDonald J, 2 December 2020) §76 et seq.
123 P24 et seq.

groundwater vulnerability as well as the distance to the closest surface water receptor and estimation of the dilution factor of the watercourses. Therefore, it is said, the WERATN considers it highly unlikely that any contamination from the site will reach the closest surface water receptor via the groundwater. "*While the Water Risk Assessment similarly considers the likelihood of contaminated groundwater reaching the Lower River Shannon SAC to be negligible; the significance of potential effects on the Lower River Shannon SAC is uncertain as some of the qualifying interests may be affected indirectly through the potential for reduction in water quality*". [124] The NIS next asserts that *"The integrity of the … SAC is not considered likely to be affected as the WERATN …… considers that it is highly unlikely that any contamination from the site has reached, or will reach, surface water receptors via groundwater."* The NIS then moves[125] to Mitigation Measures which it describes primarily by citing the other documents[126] enclosed with the Planning Application. The NIS records[127] that *"The mitigation measures to be implemented to avoid effects on ground and surface water are measures that are well established and proven to work. The measures proposed in this report and in greater detail in the documentation accompanying the planning application are used as standard in construction and operation of similar developments and their efficacy in protection of the receiving environment is proven and demonstrable."*

40. The NIS concludes[128] that there is certainty that will be no adverse effects on the integrity of the SAC and that the Board has sufficient information to allow it to so conclude.

ETI Submission - 3 June 2021 - Content

41. Substantively[129], the ETI Submission is a wide-ranging document – covering many topics and running to over 100 pages[130]. Of present interest is its assertion that the redevelopment of the Site, formerly a quarry, latterly a petrol station and sitting on an extremely vulnerable[131] karstic limestone aquifer which creates a direct hydrological link to the European Sites, creates a major risk of groundwater contamination and, in turn risk to the SAC. The contamination risk is allegedly posed by hydrocarbons and other leachates due to the petrol station and to the Tanks, likely corroded and leaking, to be removed.[132]

42. ETI asserts inadequacy of the Site investigation and of the AA as to the risk posed to groundwater by the contaminated Site. Inter alia, ETI asserts that Cloncaragh has not demonstrated, given that karstic features may redirect groundwater flow from general surface gradients, that the groundwater flow direction from the Site is to the southeast[133] to the Dooradoyle River[134]. Put simply, ETI asserts that Cloncaragh assumes a longer and more diluting flow to the European Sites than might be the case by reason of karstic features resulting in shorter/more direct routes to the

124 p25 §5.1.3
125 §5.1.5
126 Construction Management Plan (P. McGann & Co. Ltd. January 2021); Soil Management Plan – Basement Construction (SLR 2021c); Groundwater Management Plan (Basement Construction Phase) (SLR 2021a); Construction & Demolition Waste Management Plan (CDWMP) (Pierce McGann Consulting Engineers. 2021); Civil Engineering Report (Pierce McGann Consulting Engineers. 2021)
127 P27
128 §5.2 Consideration of Findings
129 I will address later the procedural sequence of events relating to the ETI submission to the Board in relation to the planning application.
130 Including appendices. One of which is a petition signed by over 100 local residents. Nothing turns on it for present purposes. Excluding the Petition, the ETI submission runs to about 60 pages.
131 As defined and identified to the locality by the Geological Survey of Ireland.
132 A risk posed by toxins used in quarrying is also asserted – as having been ignored in the Planning Application. It is not relevant to these proceedings.
133 The ETI Submission at p34 says southwest but this is clearly in error.
134 See Figure 2 above

European Sites. ETI notes that URS had inferred groundwater flow to the west and southwest – i.e. more directly towards the European Sites – which flow Cloncaragh ignores. This is alleged to be a "fatal" and "major omission"[135] - as is the alleged absence of a geological or hydrogeological report or groundwater report. The inadequacy of the Groundwater Management Plan is asserted. So, ETI asserts, Cloncaragh's assumptions as to dilution of pollutants in the Dooradoyle River en route to the European Sites are unreliable having regard to the standard of proof beyond reasonable scientific doubt required in AA[136].

43. ETI asserts[137] a risk posed by intended piling – the gravamen of which seems to be a risk of providing a route for hydrocarbons and like toxins to reach groundwater. However, and notably, the ETI Submission does not identify a risk of cement leaching to groundwater.

44. The ETI Submission considers the URS Report, inter alia, as:

- Relating to the safety of the site for commercial, as opposed to residential, development.
- Recording variable groundwater levels to no discernible seasonal pattern.
- Recording hydrocarbons found and pollutant risks.

45. The ETI Submission critiques the WERATN and NIS in some detail, inter alia:

- That the WERATN was anonymously prepared and based on conjecture, assumptions and a lack of evidence.
- Asserting that the WERATN's implication that the extreme vulnerability of the aquifer has been lessened by the backfilling of the quarry is unsubstantiated.
- Doubting the conclusions that:
  - it is highly unlikely that contaminants from the site will reach the Dooradoyle river.
  - the asserted fact that that the SAC is 2.3km further downgradient, in the Ballinacurra river, from the discharge of groundwater from the Site to the Dooradoyle River will result in further dilution.
- This, it is asserted[138], ignores:
  - the direct hydrological link to the European Sites by groundwater. (In general terms, by this is meant a link directly to the European Sites to the west/southwest of the Site, not mediated by the Dooradoyle River).
  - a stream on the Site previously seen by local residents and probably now underground.
  - the complex effects of karst on groundwater directional flow.
  - variable groundwater flow direction reported by URS.
  - the URS inference of groundwater flow to the west.
  - that the URS report suggests complex geomorphology requiring further analysis.

<u>Circulation of ETI Submission to the Council & Report of the Chief Executive of the Council to the Board</u>

46. In sequence, the next relevant events were the circulation of the ETI Submission to the Council and the Chief Executive's Report. I will address these below when dealing with Ground 1.

135 As to direction of groundwater flow see ETI Submission pp5, 15, 34, 36, 42, 43.
136 Appropriate Assessment for the purposes of the Habitats Directive - Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended.
137 At p8 and briefly at p15.
138 I record what follows as assertions rather than as facts established in the ETI Submission.

AA - Inspector's Report & Board's Decision

47. The Inspector's consideration of AA starts[139] with a recital of the reason for the 2019 refusal: essentially that the AA Screening Report and other information to hand had not enabled a full understanding and analysis of the hydrological connectivity between the Site and the European Sites, and the potential implications of the proposed development on groundwater quality. The inspector then recites certain content of the report of the Inspector which had informed that refusal, as follows[140]:

- The Site is on a highly vulnerable aquifer with bedrock near the surface.
- The history of hydrocarbon contamination of the Site.
- The proposal required removal of c.33,000m^3 of soil/subsoil and 4 fuel tanks to accommodate basement parking. This prompted serious concerns at potential pollution via percolation of hydrocarbons and hazardous substances impacting water quality.
- The AA Screening Report stated that, assuming correct implementation of listed mitigation measures, impacts via the groundwater pathways are not likely to be significant.
- There is a direct link from the Site to the European Sites.
- The works, including excavation, removal of fuel storage tanks and the treatment of contaminated materials from the site, had not been fully detailed or assessed as to the potential impact on European Sites.
- Having regard to the scale of works and implications for groundwater quality a NIS was required.

48. The Inspector had, earlier in her report[141], recited observers' concerns thematically[142] as including[143]:

- Removal of the hydrocarbon-contaminated tanks, soil and water and the possibility of other contaminants.
- Bedrock, aquifer, groundwater vulnerability and directional flow, contamination and environmental impacts, and absence of assessment of the impact of past quarrying thereon.
- The URS report contemplated commercial, not residential, use.
- The WERATN fails to consider the quarry, the direct hydrological link to the SAC, the URS report inference of groundwater flow to the west (towards the SAC) and southwest, and the complex effects of karst on groundwater directional flow.
- Risk to the integrity of European sites by contaminated groundwater via the direct hydrological link.
- That the current proposal fails to overcome the 2019 reason for refusal.
- Inadequacy of data provision.

The Inspector notes[144] that the Planning Authority raised no objections on these grounds[145].

139 Inspector's report §11
140 I paraphrase and summarise.
141 §7
142 As opposed to by identification of observer and as the Inspector was entitled to do.
143 I paraphrase and summarise.
144 P77
145 This is a reference to the statutory report of the Council's Chief Executive.

49. The Inspector had also, in her general planning assessment, considered the subject of contaminated lands[146], including removal of the Tanks containing contaminated water and of contaminated soils – citing in this regard a "common thread" of observers' concerns, including, by necessary implication, ETI's concerns. The Inspector notes[147] historical hydrocarbon impact near the Tanks at the depth of the smear zone of the groundwater table and the underlying soils, indicating a probable contaminant source deriving from the base of the Tanks. She notes documents submitted[148] all of which she reads together[149].

50. She notes in particular the content and conclusion of the URS Report and the view expressed in the Construction and Demolition Waste and Management Plan that removal of fuel tanks and disposal of excavated materials to a licensed waste facility, necessary for the decontamination of the site, is not unusual for a city centre brownfield site. She notes that the Groundwater Management Plan includes measures to ensure that groundwater on the Site and any potential contaminated groundwater in the vicinity of the Tanks is collected, treated (where required) and disposed of/discharged in a manner that does not affect the integrity of the European Sites. She records that those mitigation measures include:

- Safety measures and contaminated water control measures relating to the removal of the Tanks and surrounding contaminated ground.
- A site-specific groundwater control management plan – to be agreed with the Council before works start.
- All groundwater generated from the activities on site is to be filtered and processed before discharge to sewers.
- Measures to ensure that groundwater is not polluted by excavation and/or construction works – in particular, management and control of groundwater will be such as to prevent any pollution downstream of the Site.
- Excavation and construction will accord with various listed documents[150].

The inspector considers[151] that *"Mitigation measures are set out in detail in the relevant reports which I consider reasonable and enforceable".*

51. Notably, the inspector next devotes particular attention to the subject of "Excavations & Construction/Demolition Waste Management"[152], inter alia by reference to the Construction Management Plan. She notes that extensive excavation of the basement car park is intended and that "*details are set out*"[153] of the manner in which contaminated ground is to be excavated and disposed of. She notes that a secant pile wall will prevent groundwater ingress from surrounding roads before Tank removal starts. (The Inspector does not display any lack of understanding of what secant piles are). A specialist contractor will remove traces of contaminated material from the Site. More generally, all excavation on Site will be in accordance with the various SLR Reports. The inspector goes on to describe the procedure to remove the Tanks, once the secant piles are in place and before the bulk excavation starts, as including isolating the area around the Tanks with steel

146 §10.8
147 This is later in the report at p72.
148 Listing the Soil Management Plan and Basement Construction, the Technical Note: Water Environment Risk Assessment, the Groundwater Management Plan (Basement Construction Phase), the Civil Engineering Report, the Natura Impact Statement, the Construction Management Plan, and the Construction and Demolition Waste Management Plan.
149 Inspector's report p76
150 SLR documents. • Punches Cross GW Management Plan. • Punches Cross Soil Management Plan. • Appendix 01 Bulk Excavation. • Appendix 02 – Basement Excavation Plan – Groundwater Control Concept. • Appendix 03 – Basement Excavation Phasing. • Appendix A – Basement Excavation Plan. • Appendix B – Waste Classification Assessment. • Appendix C – Basement Excavation Phasing.
151 P70
152 §10.8.2
153 Listing SLR documents listed in footnote above.

sheet piles to a depth of 10mOD to allow safe extraction of the Tanks and potentially contaminated ground material surrounding them. The sequencing and phasing of these works are described in the SLR reports.

52. Also notably, the inspector devotes particular attention to the Groundwater Management Plan[154] submitted in response to the previous reason for refusal – as is the NIS. She recites the basis of SLR's inference of groundwater levels at 9.4mOD to 10mOD across most of the Site, corresponding to regolith depth across much of the site. It appears to be recharged from underlying limestone bedrock. There next follows[155] the inspector's account of the basement formation and other levels. Notably, for present purposes and at the expense of repetition, it records:

> *"…….. a likely positive groundwater head of up to +2m in the north-western corner of the site above the base of the excavation with the majority of the basement exaction above the average groundwater level suggesting a dry excavation. Groundwater control will be required in localised areas of the site where the deeper stormwater attenuation tank will be constructed in order to maintain a dry excavation and enable basement and drainage construction. The stormwater attenuation tank will be below rest groundwater level and therefore an appropriate waterproofing design will be required to ensure no ground water ingress into the attenuation tank or drainage infrastructure on completion."*

53. There follows[156] the inspector's description of excavation phasing and groundwater management measures. It is too lengthy to set out here in full but it includes:

- A specialist groundwater control contactor to provide detail design and to implement the groundwater control scheme – including its day-to-day management.
- A suitably qualified Environmental Consultant to manage the contaminated soil excavation around the Tanks.
- Identification by delineation borehole investigation of the contaminated zone, followed by its isolation from the rest of the excavation and dewatering works by a sheet pile wall.
- Use of an oil/water separator plant for groundwater abstracted in the contaminated zone. The plant proposed, of a type used in redevelopment of petrol station sites where tanks are removed, typically reduces dissolved hydrocarbon concentrations to below laboratory limits of detection.
- In some detail, a description of the removal procedure as to the Tanks and contaminated soil and dewatering of the area isolated by sheet piles for that purpose.[157]
- Ongoing soil sampling and analysis to validate the extent and completion of contaminated soil excavation.
- Groundwater abstraction from the excavation generally.
- Reference to SLR's involvement in and knowledge of other similar remediation projects.

54. The inspector concludes[158] as to contaminated soil and groundwater risk that the measures proposed are robust and sufficient and address concerns raised by third parties.

154 §10.8.3
155 P73
156 P73 et seq
157 P74 & 75
158 P76

55. I observe that the Inspector's recital of the 2019 refusal, of the Inspector's report in that refusal, of the observers' submissions and of the AA Screening Report and NIS in the present application, and her treatment of the issue of contaminated lands and groundwater risk demonstrate that she was, in reporting to the Board on AA issues, fully conscious of the asserted risk posed by contamination of groundwater to European Sites and of the issues in that regard recited by her. I observe also that she had concluded that the measures proposed in those regards were robust, sufficient, and address the concerns raised by third parties.

56. Of the foregoing elements of the Inspector's Report, ETI says that she "*simply summarises what has been said by the developer before saying that it's satisfied that it's robust, but without providing any analysis*".[159] I respectfully reject that criticism. Given the technical nature of the task and works described, the fact that the proposed works under consideration were those proposed by Cloncaragh, that description of those works was to be found only in Cloncaragh's expert reports and that no contrary technical appraisal had been submitted[160] it is entirely unsurprising that the Inspector's report should have been largely informed by Cloncaragh's expert reports. The Inspector's report records a lengthy and detailed appreciation of what Cloncaragh proposed by way of those expert reports. I see no deficiency in the Inspector's report in that regard. Indeed, it seems reasonable to infer that ETI's pivot of their complaints to an issue of cement leaching rather than hydrocarbon contamination likely reflects its own view to similar effect.

57. Returning to the AA Section of her report[161], I note that the Inspector considered the content of the combined AA Screening Report/NIS as "*reasonable and robust*" and that "*the submitted information allows for a complete examination and identification of all the aspects of the project that could have an effect, alone, or in combination with other plans and projects on European sites"*. [162]

58. Essentially for the reasons set out in the AA Screening Report, she concludes that significant effects on the SAC could not be excluded. She notes specifically that the AA Screening Report identified potential pollution during the excavation, removal and treatment of the Tanks and contaminated material during construction and potential migration of contaminated groundwater to the SAC which could potentially cause adverse effects on the qualifying interests of the SAC. So her screening determination was that AA was required as to the possibility of adverse effects on the qualifying interests of the SAC.

59. The Inspector then moved to AA[163]. She observed that while the NIS itself was light on information, she identified the various site-specific documents[164] as to mitigation, cited in the NIS, as critical to her AA. The main area of concern was potential pollution during the excavation, removal and treatment of the Tanks and contaminated material and potential migration of contaminated groundwater to the SAC. She recites her detailed assessment of the methodology for the removal of Tanks, excavation, removal of contaminated soil and the groundwater protection plan and

159 D2 p132
160 That is a statement of fact rather than a criticism.
161 §11
162 P83
163 §11.11
164 Soil Management Plan and Basement Construction, A Technical Note: Water Environment Risk Assessment, Groundwater Management Plan (Basement Construction Phase), Civil Engineering Report, Construction Management Plan and Construction and Demolition Waste Management Plan.

mitigation measures already set out[165] and again describes them as "*robust and satisfactory*"[166], and as "*clearly described, reasonable, practical and enforceable*"[167] to avoid or minimise the risk of impacts on the SAC.

60. Accordingly the Inspector considers it reasonable to conclude[168],
    - on the basis of objective scientific information on the file, which she considered adequate to perform AA,
    - and of complete assessment of all aspects of the proposed project,
    - having regard to the works proposed during construction,
    - and subject to the implementation of best practice construction methodologies and the proposed mitigation measures,
- that the proposed development would not adversely affect the integrity of the SAC or any other European site in view of their Conservation Objectives,
- and that there is no reasonable scientific doubt as to the absence of adverse effects.

These are the formal conclusions required in AA if planning permission is to be capable of being granted.

61. The Impugned Board Order records that it had performed AA Screening and AA. It explicitly adopts the Inspector's report in both regards and echoes her conclusions.

Evidence

62. No fewer than 14 affidavits were sworn. While desirable in any event, it is necessary to set out an account of the affidavits given a dispute, in the context of Ground 3 as to AA, as to the status of some evidence and the significance of the fact that no deponents were cross-examined.

Affidavit of Michelle Hayes - sworn 11 October 2021 – filed by ETI

63. The judicial review application is grounded on the first Affidavit of Michelle Hayes. She is a practising solicitor and president of ETI. She authored the ETI Submission. She verifies the grounds, exhibits relevant documents, generally canvasses the themes of the ETI Submission. Inter alia, says that:

- The architectural and engineering drawings submitted with the Planning Application differ as to basement floor level: the former saying 10mOD; the latter saying 11mOD. It is unclear which is correct. So, the building will either be 1m higher than proposed[169], or 1m deeper than the environmental and engineering calculations assume[170]. This discrepancy was not identified in the application process.

165 §10.8 of her report.
166 §11.11
167 §11.14 (mis-numbered 1.14)
168 §11.14 & §11.15
169 Assuming the engineering drawings correct.
170 Assuming the architectural drawings correct.

- Generally, at the northern end of the Site, bedrock is within 3m of the surface, the centre of the site has been excavated and filled in in the past[171] and the southern end of the site falls away.[172] Groundwater levels are cited – higher at the northern end of the Site at 10.65mOD to 12.56mOD.

- The construction of the basement car park will involve:
  - excavation into bedrock at the northern end of the Site;
  - the laying of a concrete floor onto bedrock at the northern end of the Site and close to bedrock at the southern end.

- The Site will be part-surrounded and/or the Proposed Development part-supported by permanent secant piling[173]. This involves drilling interlocking bores into bedrock to a depth of 4m or more below the 9.5mOD estimated groundwater level and filling the bores with concrete. The Planning Application does not adequately explain that process.

- Pollution risk to groundwater posed by "*cement, oil and chemicals*" was inadequately addressed in the Planning Application. Cement is highly alkaline[174] and the risk of its discharge to groundwater in the piling process and by pouring of concrete on or close to bedrock – for example as floors - is not addressed in the planning application and represents a serious lacuna in the AA.

64. The affidavit also deposes to the events involved in the making of the ETI Submission to the Board. I address these further below.

<u>Affidavit of Pierce Dillon - sworn 20 January 2022 – filed by the Board</u>

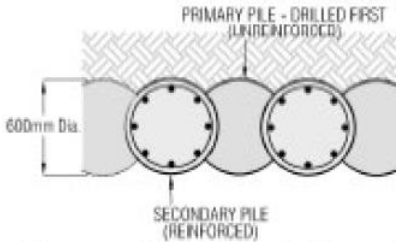
65. This is essentially a formal affidavit exhibiting relevant documents and objecting to the ETI raising issues in this judicial review not raised by it in the planning process before the Board.

<u>Affidavit of Tim Paul - sworn 28 January 2022 – filed by Cloncaragh</u>

171 I presume this to be a reference to the quarry.

172 Citing the Planning Application Groundwater Management Plan, and Waste Management Plan borehole survey and URS report sampling data.

173 Essentially, the watertight ground-retaining secant piled wall will run under the building line along the north-west (Ballinacurra Rd), north (Punch's Cross), and north-east (Rossbrien Rd) faces of the site as depicted in engineering drawing 18-104-10, "Bulk Excavation", which can be found at Appendices 1 & 2 to the Groundwater Management Plan (Basement Construction Phase) and in engineering drawing 18-104-2. The word "secant" denotes overlapping/interlocking piles. The illustration below is taken from the Construction Management Plan submitted with the Planning Application.



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174 The Affidavit says acidic but that is clearly wrong and is corrected in a later affidavit.

66. Mr Paul is an engineer of SLR, authors of many of the reports submitted with the Planning Application. He, inter alia:

- Asserts the adequacy of the various reports as to assessment of risk – including risk of hydrocarbon contamination.

- Identifies the author of the WERATN as a named hydrogeologist on SLR's staff.

- Asserts that questions of hydrogeological connection to the European Sites were fully addressed in the WERATN and NIS which concluded that contamination of the European Sites would be highly unlikely and, if it occurred, negligible, citing very high dilution factors en route.

- Asserts that the Proposed Development will have an important benefit in resolving a known source of contamination by removing the remaining Tanks.

- Asserts that Ms Hayes' concern as to cement is misplaced as:
  - Groundwater control measures outlined in the Ground Water Management Plan will maintain a dry basement excavation for the basement construction save for a small controllable area in the northwest of the Site.
  - Secant piling is formed of poured concrete, not cement, in a controlled construction technique and does not result in the discharge of cement to groundwater.
  - On placement, concrete cures and hardens to form solid concrete elements.

- Asserts that
  - the "key point" is that the GSI[175] does not classify the limestone bedrock aquifer as karstic.
  - the bedrock is fractured limestone with fractures approximately 0.2cm apart[176].
  - the correct bedrock and groundwater levels have been identified.

- Asserts that the Groundwater Management Plan sets out in considerable detail the more-than-feasible groundwater management and control measures for the basement construction using proven measures and technologies.

<u>Affidavit of Pierce McGann - sworn 28 January 2022 – filed by Cloncaragh</u>

67. Mr McGann is an engineer of Pierce McGann & Company, civil and structural engineers to Cloncaragh.

68. Mr McGann describes secant piling as providing permanent retaining walls around the site, including for the basement, and fulfilling other structural needs. The piles will be seated into the underlying weathered limestone at depths greater than 5m. He illustrates this by a Construction Management Plan Secant Piling Section detail drawing[177] which shows:

- the basement level at 11mOD and basement formation level at 10.5mOD.
- a variable groundwater level at average 10mOD falling across the site.
- a variable rock level at average 9.5mOD.

175 Geological Survey Ireland
176 See p5 WERATN
177 Construction Management Plan p13

- secant piles extending to an average of 4m below rock level.

69. Mr McGann says secant piling "*guarantees that groundwater is prevented from flowing into the basement excavation"* and *"eliminate[s] issues of groundwater ingress into the site*".

70. Mr McGann:

- asserts generally that the Construction Management Plan and Groundwater Management Plan set out detail of the secant piling and of the interplay of construction detail and groundwater management.

- denies that the secant piling process involves pouring cement into holes drilled in bedrock – the gravamen of which observation appears to be that what is poured is concrete not cement.

- asserts that secant piling is suited to use in limestone.

- is clear that concrete will not discharge to groundwater.

- asserts that the secant piling is drilled, not excavated, "*as wrongly believed by Ms Hayes*". (If I correctly understand secant piling as excavation by drilling of vertical holes into which concrete is then poured, I do not understand this distinction made by Mr McGann as it seems to me that drilling is a particular form of excavation. This was my reaction to Mr McGann's Affidavit before I had read the affidavit of Michael Duffy[178] so it is not a question of my now preferring the latter to the former on this issue.)

71. Mr McGann says Ms Hayes is wrong in believing that the buildings will be supported on piles – pad foundations will be used and can be laid so as to ensure that freshly poured concrete will not contaminate groundwater. The foundations will not contaminate groundwater.

However, Mr McGann also says that the piles will fulfil structural needs. So I am unclear of the position in this regard. They will obviously be retaining walls, and their location directly under the outer walls of the building may be significant. That said, it is not apparent that anything turns on this for present purposes and pad foundations are clearly intended[179].

72. Mr McGann addresses the assertion of discrepancy between the architectural and engineering drawings as to basement floor levels. He does so essentially by explaining and asserting the correctness and coherence of the engineering drawings and other documents reflecting a basement floor level of 11mOD. He says that detail of construction works, measurements and depths are not usual on architectural drawings and says he is "*at a loss to understand … how Ms Hayes could be unclear on these details*". He embarks on a technical explanation at some length.

I confess that on first reading this Affidavit as to that allegation of discrepancy, I was left confused – especially as to the answer to the simple and basic question whether there was in fact a discrepancy between the architectural and engineering drawings as to basement floor levels. So I initially thought

178 See drawing below.
179 Construction Management Plan p22

Mr McGann's criticism of Ms Hayes harsh. As will be seen, in a later affidavit Mr McGann accepted that indeed there was, as between the architectural and engineering drawings, the very discrepancy Ms Hayes asserts as to basement floor levels. On rereading Mr McGann's affidavits, I am confirmed in my view that it is regrettable that, before embarking on a complex explanation and justification of the engineering drawings and criticising Ms Hayes, Mr McGann didn't, as a matter of the assistance the court expects from expert witnesses, simply and clearly accept and identify the existence of the discrepancy.

73. Mr McGann points out that the 11mOD basement floor level implies, in ease of risk to groundwater, a shallower excavation than a 10mOD basement floor level and says that, for excavation to 10mOD (to allow a 11mOD basement floor level), groundwater inflows are not expected and so groundwater controls will not be required for the majority of excavation works. He disputes any effect of the 11mOD basement level on building height.

74. Mr McGann echoes Mr Paul as to groundwater-borne risk to the European Sites.

Affidavit of David Drew - sworn 15 February 2022 & Exhibited Drew Report – filed by ETI

75. Dr Drew is clearly a hydrogeologist of considerable eminence, not least as to Irish limestone hydrogeology and karstic hydrogeology. Inter alia, he is the co-author of a GSI publication on the Karst of Ireland for the general reader and the sole author of what is clearly an important text on Irish karstic hydrogeology addressing, inter alia, investigative methods[180], and published by GSI[181] and written for an expert and technical readership. He did not contribute in the SHD planning process.

76. As relates to AA, Dr Drew considers that further hydrological investigation should be done. He cannot accept the conclusions of Mr Paul and Mr McGann as to hydrogeology. He disputes, to paraphrase him, that absence of evidence of karstic limestone is evidence of its absence. In limestone in a wet climate, karstification is assumed – only its type is unknown. He considers that the Applicants have assumed and surmised, rather than demonstrated, the hydrological connectivity between the Site and the European sites. In this he is referring to the precise directional route, as opposed to the more general issue of the existence of an hydrological connection, which is common case.

77. His exhibited report cites his consideration of the URS Report, the SLR Groundwater Management Plan, and the WERATN. He expressly, and properly, confines himself to hydrogeological issues – he explicitly disavows consideration of contamination and development issues. Indeed, he does not mention AA or relate his analysis to the requirements of AA or to the standards of proof and certainty applicable in AA. He says nothing on the question of doubt as to adverse effect on the European Sites.

180 P2 states "Chapter 9 describes methods suitable for investigating karst hydrogeology with explicit reference to those approaches best suited to the Irish environment."
181 Drew, D. 2018. Karst of Ireland: Landscape Hydrogeology Methods. Published by Geological Survey Ireland.

78. Inter alia, Dr Drew:

- Asserts that a secure understanding of existing groundwater conditions is essential to a robust groundwater management plan which will prevent contamination of surface water bodies.

- Asserts that the URS and SLR Reports differ significantly in interpreting some aspects of geology and hydrogeology beneath the site and in the surrounding area. Neither investigates groundwater conditions to the point of provision of definitive answers.

- Makes detailed criticisms of the site investigation and the conclusions SLR draw from it[182] – in particular uncertainty as to the composition of the regolith[183], the absence of information as to groundwater in the bedrock for want of boreholes penetrating it, the possibility of perched groundwater, and the improbability of the steep water table gradient inferred by SLR from what he considers the anomalously high water level results of a single borehole at the northern end of the site - from which gradient SLR inferred generally southerly groundwater flow.

- Observes that objectors note an on-site water supply borehole which may penetrate into the limestone and could yield important water level data but is not referred to in the Reports.
  - Mr Paul denies the existence of such a well on-Site. At trial it became apparent to my satisfaction that Dr. Drew's observation likely derived from ETI's misinterpretation of a URS drawing[184] which in fact shows a well over 250m southeast of the Site[185].

- Observes that SLR suggest possible upwards groundwater flow from bedrock at the northern part of the site. If true, this would be highly significant but it does not seem to have been investigated further.
  - I observe that Dr Drew does not elaborate on why this is significant or with what possible or actual practical consequence, and the Planning Application documents explicitly envisages wet excavation in this area as requiring groundwater control measures.

- Observes that all limestone aquifers such as this will be karstified to some degree and so develop preferential flow paths, making flowpaths and discharge points difficult to predict without appropriate hydrogeological investigation. The SLR reports scarcely mention such conditions and instead seem to assume conventional, predictable, uniform down-hydraulic gradient flows (i.e. to the south east[186]). URS thought groundwater flows were to the south in August 2011 and to the west in October 2011/February 2012. SLR thought they were to the southeast/south – in each case determined by "groundwater"[187] gradients based on borehole water levels and assuming flow along the steepest gradients.

- observes that the SLR Report initially presumes a direct hydraulic link between the site and the Shannon and later definitely asserts it to be a link to the Dooradoyle river, a tributary to the Shannon.
  - I comment that:

182 See p5 of the WERATN and below.
183 Regolith is the layer of unconsolidated solid material covering the bedrock. The URS report and SLR Groundwater Management Plan describe it as made ground over glacial till over weathered limestone and/or limestone gravel. Dr Drew is dubious, as quarrying would likely have removed the till and weathered limestone. I infer that his inference is that the regolith from surface to bedrock likely comprises made ground – at least in the area of the former quarry.
184 URS Report 2013, Figure 6
185 Its estimated location is shown on Figure 2.3 of the of the WERATN
186 My observation - see figure 2 above.
187 Parentheses Dr Drew's

- This appears to be a reference to the WERATN. As I read it, the WERATN initially records[188] the inspector in the earlier planning application as having assumed a direct source-pathway-receptor linkage to the Shannon/Fergus. It does not record the SLR authors as expressing that opinion.
- SLR's opinion[189] is that "*Groundwater flow direction in the limestone bedrock and overlying limestone gravel is expected to follow the topography towards the south east*", "*towards the Dooradoyle River*" and "*over 500m from the site*" to a point about 2.3km upstream of the European sites.
- This resulted in a conceptual model in which the assumed pathway was "*Lateral migration through fractured bedrock aquifer to Dooradoyle River >500m downgradient of site[190], followed by migration in Dooradoyle River to Lower River Shannon SAC*".
- Crudely, that assumes a 2.8km and much more diluting route than a more direct route via groundwater flow to the European Sites[191] - the nearest points of which are 1km southwest of the Site as the crow flies[192].

79. Dr Drew states that his reasons query the validity of the conclusions as to groundwater flow and as to hydrogeology more generally. Notably, he considers it *"probable that the presumed groundwater levels relate to the regolith and that there is a regional water table in the bedrock unrelated to the superficial water system in the overburden. The latter may simply represent radial drainage of regolith water off the bedrock knoll on which the site is located."* Or the data "may well" represent *"a perched groundwater body unrelated to the true groundwater in the bedrock".* And, especially *"if the aquifer is karstic, with preferential flow paths and a weak relationship between flow directions and hydraulic gradients", "Even if data for the bedrock aquifer were available it would not be possible to estimate groundwater flow directions by extrapolating from water level data for the boreholes clustered into such a small area (0.77ha). Data from a much wider area would be needed."*

80. Dr Drew considered further investigations desirable, including:
- Drill borehole into limestone to 30-40m below ground and record water data.
- Take on board the probable karstic nature of the aquifer.
- Verify the true groundwater flow direction to identify the likely receptor of any contaminated water.

81. While it was not his only point, it does seem fair to say that the primary thrust of Dr Drew's report was that the Planning Application assumed, but failed to demonstrate, groundwater flow direction from the Site to the southeast and so erroneously ignored other possible, shorter, directional routes to the European Sites.

<u>Affidavit of Michael Duffy – sworn 17 February 2022 – filed by ETI</u>

82. Mr Duffy is an engineer. He comments on the McGann and Paul Affidavits, inter alia, as follows:

188 WERAR §1.1
189 WERATN §2.1.2 & 2.1.4; Groundwater Management Plan §3.1
190 See figure 2 above.
191 This is clear, at least in general terms, from the fact that SLR estimate dilution through the 500m at a factor of "over 1000" whereas 2.3km of the Dooradoyle River provides dilution at a factor of 2,900,000. See McGann Affidavit 28/1/22 §14.
192 See Inspector's report p85.

- He suggests the McGann affidavit is confusing on the basement floor level issue. (I have addressed this issue above.)

- The issue is not groundwater ingress but the potential for groundwater contamination during construction, including of the secant piles.

- A secant pile site wall will have no impact on groundwater rising through the bottom of the site or on material being discharged down through it.

- The effectiveness of groundwater management depends on seasonal water levels - which were not assessed.

- Mr Duffy exhibits two publicly available geological assessments[193] on the GSI website not cited in the Planning Application and which, he says, conflict with the Planning Application as to groundwater data and water table levels. He does not explain how they are in conflict with the Planning Application nor does he attribute significance to any such conflict. I am not competent to interrogate Mr Duffy's assertion of such conflict.

- The borehole drilling stopped on meeting what was presumed to have been, but may not have been, bedrock, and there is *"no evidence at all as to the nature of the bedrock or how fractured it may be".*

- The secant pile construction method (excavation method, use of tremie pipe to pour concrete and use and watertightness of temporary shuttering) is very poorly described in the Planning Application. Nor is whether they will avoid cement washout during pouring or after their removal described. Whether the space for the piles is "*excavated*", "*drilled*" or "*bored*" is irrelevant as to contaminant interaction with groundwater – there is every likelihood it will disturb in-situ contamination and/or cause fissures in the rock providing contamination pathways to groundwater.

- It is selective to say that concrete will not be discharged to groundwater when the piles are being poured and are curing – highly alkaline cement[194] may be washed out of the concrete into groundwater and is a potential source of pollution of the European sites. It may also wash out from poured floors. This is not considered in the AA. The Inspector had no information on these issues.

- Ms Hayes' use of the term "*karstified*", when "*to be pedantic*" she should have said "*weathered*" and "*fractured*", does not justify dismissal of her concerns as incorrect and is "*splitting hairs*". The main point is that the limestone is fractured, providing potential connectivity to the European Sites.

- The AA is based on uncertainty as to the pathway to the European Sites: if the pollution does not go to the Dooradoyle River there is no knowledge of where it goes or "*ends up*".

- The evidence does not support the claim of complete assessment – there is clearly a scientific doubt as to potential adverse impacts on the European Sites.

193 The first is a 2007 site investigation report by Michael Punch & Ptnrs, Engineers on a site at "Punches Cross" in contemplation of a commercial development. It is clear from the site plan that the report is on at least part of the subject Site. The second is a 1995 site investigation report by William Hutch, Engineer. It appears to be on a site just southeast of the subject Site.
194 The affidavit also asserted that the risk of washout of lead and zinc was not considered in the AA but ETI disavowed pursuit of that issue – Day 2 p102.

2nd Affidavit of Michelle Hayes - sworn 22 February 2022– filed by ETI

83. This Affidavit:

- Records that Ms Hayes holds a B.Sc. in pharmacy and asserts, on that basis, expertise in physical, chemical and biological sciences.

- Protests that the fact that the Council did not consider and report in light of the ETI Submission is not a trivial or insubstantial matter.

- Disputes Mr McGann's account of the basement FFL position and states that ETI did not spot the discrepancy in that regard between the architectural and engineering drawings until after it had decided to challenge the decision on other grounds.

- Asserts failure to identify in the Planning Application an on-site water supply well identified by URS.
  - As observed above, I believe this assertion to be based on a misunderstanding of URS Figure 6 which in fact shows the well over 250m off-site.

- Disputes Mr McGann's response on the secant piling issue – including by saying that his distinction between drilling and excavation is pure semantics.

- Asserts that Mr Paul has failed to refute the assertion of lacunae in the AA – asserting that it did not look at the major potential pathway groundwater contamination through the bottom of the excavation area, and through the fractured bedrock, and did not take account of the potential for further fracturing of the bedrock by construction processes.

- Asserts that the groundwater management and control measures for the basement construction upon which Mr Paul relies are unclear and presented as options such that Condition 2 of the Impugned Permission, which requires implementation of mitigation, cannot operate.
  - I observe that this complaint was not pleaded and, given the law as to pleadings in judicial review which I address below, I will consider this complaint no further.

Affidavit of Joe Moynihan – sworn 24 February 2022[195] – filed by ETI

84. Mr Moynihan is a structural engineer. He confirms the discrepancy as to Basement FFL between the architectural and engineering drawings and says that a 1m discrepancy is significant. He does not say why it is significant or with what possible or actual practical consequence. Though its filing was understandable give the failure to admit the existence of the discrepancy, as it is since admitted, I will consider this affidavit no further.

2nd Affidavit of Pierce Dillon - sworn 20 January 2022 – filed by the Board

195 Precise date illegible.

85. It is not clear why this affidavit was sworn. It merely repeats the Board's objection to the Applicant raising issues not raised before the Board and makes submissions.

2nd Affidavit of Pierce McGann - sworn 10 March 2022 – filed by Cloncaragh

86. Mr McGann asserts that:

- ETI had not raised before the Board the issues now alleged of cement washout to groundwater, groundwater contamination through the bottom of the site and groundwater contamination during secant pile construction.

- The Board "fully considered" the ETI Submission as to issues such as alleged groundwater flow to the west and hydrological pathways to the European Sites, site contamination, groundwater vulnerability and the alleged impact of piling. It concluded that there was no scientific doubt about the lack of effects on the European Sites.

- There is no appreciable risk of groundwater contamination from cement washout from concrete used in piling works. Pad foundations and secant piling will ensure that any groundwater present will not be contaminated in construction. Secant piling is a well-established and environmentally safe method. Secant piling by auger and using an impermeable borehole sleeve[196] will not cause rock fissures and will not cause risk to groundwater by disturbance of contaminated material. Concrete poured into the sleeved borehole will contact only the small rock area at the base of the pile. Areas for laying pad foundations will be shuttered and dewatered by pumping. In both cases, the concrete hardens within an hour and remains intact during that period. There is no risk of groundwater contamination by cement from the concrete.

- There were "*typographical anomalies*" in that the architect's drawings incorrectly record a basement level of 10mOD.
  - I observe that it is a pity this anomaly was not admitted in his first affidavit. I address below the concept of a "typographical anomaly".

- The architect's concern was as to how the building will look and the engineering drawings and documents "*leave no possible doubt but that the basement finished floor level is 11m*".

- "*The purpose of more detailed reports is precisely to allow the Board, and interested parties, to consider more in-depth and detailed information than would be apparent from an architectural drawing*."
  - I observe that this discrepancy is not a question of "*more in-depth and detailed information*." The type and level of detail in question – basement FFL in mOD – is the same and equally precise on both sets of drawings. Only the number differs and the question is not of greater detail but of difference.

- The Board clearly understood the Planning Application to be based on the engineering drawings basement FFL in mOD. The relevant excerpt of the inspector's report is set out[197].
  - As will be seen, in my view this assertion is borne out by the relevant documents and was ultimately accepted by Counsel for ETI.

196 I understand this to be what Mr Duffy describes as a "tremie pipe".
197 I set it out below - §10.8.3 Groundwater Management Plan.

- The basement FFL error in the architectural drawings does not affect the overall height of the buildings. Regardless whether the basement level is 10mOD or 11mOD, the height above OD of the other floors will be the same. As between all drawings, *"The ground floor and all ground and upper floors tally exactly."*
  - As will be seen, in my view this assertion is borne out by the relevant documents.

2nd Affidavit of Tim Paul - sworn 10 March 2022 – filed by Cloncaragh

87. Mr Paul observes, inter alia, that:

- He disagrees with Dr Drew:
  - As the site investigation information before the Board is sufficient to assess groundwater management and control and soil management for basement construction and for AA purposes.
  - As to the need for further hydrological investigations and asserts the adequacy of the investigations reflected in the URS Report, the WERATN and the report of the 2019 Site Investigation.
  - As to alleged discrepancies between reports as to ground profile – there are some variations in terminology but they are not contradictory.
  - As to Dr Drew's view that no information is available as to groundwater in the bedrock. He cites URS boreholes MW11, MW14 and MW15 as drilled into bedrock and recorded bedrock water levels are provided. He also disagrees with Mr Duffy's assertion that there has been no assessment of seasonal groundwater levels. In both respects he cites Table 3-2 of the Groundwater Management Plan[198].
  - That SLR failed to investigate possible upward groundwater flow at the northern part of the site and he cites §4.2.2 of the Groundwater Management Plan[199]. (It commences: "*An estimate of the range of possible groundwater flow rates into the localised north-western area of the excavation, and thus the range of groundwater pumping rates required to maintain a dry excavation have been calculated according to the methodology set out in CIRIA C750, section 6.2.3, seepage into coffer dams*.")

- There are no water supply wells on Site.

- He had been unaware of the geological assessments on the GSI website which Mr Duffy exhibits but, having considered them, sees no conflict between them and the Planning Application.

- He disagrees with Mr Duffy as to secant piling. Secant piling is tried, tested, safe, efficient, and used worldwide. In his experience, cement washout from secant piling is a "*non-issue*" and secant piling introduces no additional soil or groundwater contaminants – it will not occur. No scientific uncertainty exists as to this issue, which was therefore not specifically addressed in the AA.

- He disagrees with Mr Duffy that groundwater will not be prevented from entering the site by what is proposed. This seems to be a reference to Mr Duffy's contention that the secant

198 Table 3-2: On-Site Groundwater Levels.
199 §4.2.2 commences "An estimate of the range of possible groundwater flow rates into the localised north-western area of the excavation, and thus the range of groundwater pumping rates required to maintain a dry excavation have been calculated according to the methodology set out in CIRIA C750, section 6.2.3, seepage into coffer dams."

piling walls will not prevent groundwater from coming up into the excavation from underneath. Mr Paul says that the Groundwater Management Plan relates to groundwater control during basement construction, not prevention of groundwater seepage into the site. That plan records that groundwater seepage will not be encountered across the majority of the excavation at elevations above 10mOD and states the methodology for calculating groundwater flow rates into the north-western area of the excavation and the pumping required to maintain a dry excavation. All this accords with industry practice and is robust. The Groundwater Management Plan is consistent with industry practice and will ensure robust groundwater management and control.

  - As I understand this, Mr Paul:
    - Accepts that the secant piling will not prevent groundwater seepage up from below the Site into the excavated area.
    - Says that such seepage is expected only where groundwater levels will be close to excavation levels – primarily in the north-western area of the excavation.
    - Says that such seepage will be managed by pumping to keep the excavated area dry – which pumping is provided for in the Groundwater Management Plan.

- Mr Paul says that the offsite migration of contamination via groundwater and linkage to the SAC has been addressed in the AA by provision of mitigation measures on a "*precautionary basis*". This precautionary approach and those mitigation measures will apply independent of the groundwater flow direction in the vicinity of the site.
  - By this last sentence I understand Mr Paul to say that, by reason of the mitigation measures proposed, particularly the Groundwater Management, contamination will not get into the groundwater so that the question of groundwater flow direction becomes irrelevant.
  - I observe that
    - Mr Paul repeatedly emphasises the precautionary approach taken in terms redolent of a view that, even if that approach is not taken, no problem arises. However the precautionary approach is a central legal principle of EU Environmental Law and its application and benefits cannot be implicitly discounted as anything less than necessary. The fact that AA was done on a "precautionary basis"[200] is merely compliance with a legal requirement.
    - The conclusion in AA in this case that there is no risk to European Sites is explicitly based on a view that groundwater will flow southeast only and via a 2.8km and highly-diluting route to the European Sites[201]. Indeed, even that route and its resultant dilution factors were not sufficiently reassuring in AA Screening to render AA unnecessary.

- The WERATN had considered the potential groundwater contamination pathway through the bedrock beneath the site[202]. Ms Hayes' contrary proposition was mere assertion.
  - I observe that Ms Hayes' contrary proposition is not mere assertion – Dr Drew supports it.

- Whereas Dr Drew states that hydrological connectivity of the site has only been surmised, not demonstrated, hydrological connectivity of the site to the SAC via weathered bedrock has been considered on a precautionary basis and this is a robust approach for AA purposes. The Planning Application reports[203] are cited. Mr Paul responds similarly to Mr Duffy.

200 AA Screening Report/NIS §4.2
201 AA Screening Report/NIS §4.1.1
202 Citing §§2.2.2 and 2.2.4
203 Including §4.2 of the AA Screening Report and NIS and §2.2.4 of the Water Environment Risk Assessment as to the Controlled Waters Risk Assessment

- It is not apparent to me that Mr Paul specifically addresses or cites particular content of the planning application as addressing, the possibility of more direct hydrological routes from the Site to the SAC

- Mr Paul cites the WERATN[204] to the effect that the URS Report considered the preferential contamination pathway to be weathered bedrock and the URS Controlled Water Risk Assessment calculated SSTLs for contaminants of concern were not exceeded and were protective of groundwater 100m downgradient of the site. URS concluded that "*currently no significant risks to controlled water receptors exist at the site from either soil or dissolved phase contamination in shallow groundwater*."
  - As I have observed above, the significance of this observation as to controlled waters for purposes of considering Habitats Law issues, as this observation is made to a court in proceedings, is impossible to discern for want of explanation by Mr Paul. Its significance would not be surprising but is not self-evident to a layperson in this regard such as myself.

<u>3rd Affidavit of Michelle Hayes - sworn 29 April 2022 – filed by ETI</u>

88. This affidavit:

- Expands on Ms Hayes' assertion of scientific and practical expertise sufficient to understand the issues and make averments thereon, at a level equal to that of Mr McGann and Mr Paul who are engineers with no asserted environmental or ecological expertise or qualification. The Board's inspector similarly makes no claim to any scientific expertise.

- Repeats the error of asserting the presence of an on-site well by reference to the URS Report Figure 6 which in fact shows the well over 250m off-site.

- Asserts that the implication of the McCann position as to the Basement FFL drawings discrepancy is either a reduced-height basement or an increased overall building height.

- Asserts recent user of the Site as a car-park.
  - This may or may not be deserving of criticism in the appropriate quarter but is of no relevance here.

<u>4th Affidavit of Michelle Hayes - sworn 30 June 2022 – filed by ETI & Affidavit of Gary Lawlor - sworn 30 June 2022 – filed by Cloncaragh</u>

89. Ms Hayes exhibits ETI's letter to the Council dated 26 August 2021 and the latter's response dated 31 August 2021[205]. Both Ms Hayes and Mr Lawlor, a project manager with Cloncaragh, exhibit the minute of that meeting which records it as having commenced at 09:45 a.m. on 21 June 2021.

90. Given the affidavit was to be sworn, and at the request of counsel for Cloncaragh and at my resultant direction, Ms Hayes also confirms that she had not circulated the ETI submission or disclosed its content to councillors, nor did she lobby them prior to that meeting.

204 §2.2.4 - Controlled Water Risk Assessment

205 These related to the Council's receipt/non-receipt from the Board of the ETI Submission – see further below.

Evidence & Expertise

91. While, in practice, the dividing line between evidence of fact and evidence of opinion may not always be bright, it is clear that[206] only independent experts may tender opinions in evidence – and that within the proper limits of their expertise. All other witnesses are confined to testifying as to fact.

92. Whether a witness is an expert, in what area, and the scope and limits of their expertise, may be established by reference to formal educational and/or professional qualifications, training, academic activity, or practical experience. Expertise may established by a combination of some or all. The law takes a pragmatic and substantive rather than a highly formal and technical approach in this regard[207].

93. Ms Hayes holds a B.Sc. in pharmacy and asserts her expertise in physical, chemical and biological sciences. That formal position is not disputed and I do not doubt it. However, I am not to be taken as accepting that, as relevant in proceedings such as these, undergraduate education in such sciences leading to a degree in Pharmacy, followed by no asserted relevant experience, is to be equated with the expertise of a qualified and practicing engineer operating in a multi-disciplinary firm of engineering consultants. However I need not decide that issue as, correctly in my view, counsel for ETI volunteered[208] his acceptance that Ms Hayes is in effect a litigant – "*not an independent expert, she's a party in the case*". However, he considered that this went to the weight, not the admissibility, of her opinion. He further argued that, as Mr. McGann and Mr. Paul prepared the planning application documents (including expert reports) which they were defending and had an interest in having them upheld, they were not independent experts, and their evidence should be not accepted as independent. However, he disavowed saying their evidence was inadmissible - he argued, rather, that their opinion evidence should be given no greater weight than that given by Ms Hayes.

94. He argued also that, as a matter of principle and by reference to the fact that Mr. McGann and Mr. Paul were defending their own work, I should regard their evidence as being of lesser weight than that of Dr Drew, Mr Duffy and Mr Moynihan. He did not develop these arguments or cite authority.

95. Independence is vitally important to the admission of expert evidence. Ideally, independence should be complete and unalloyed. However, the world is not ideal and, while never failing to emphasise the importance of independence, the law recognises that a necessary pragmatism generally requires that the issue of independence be usually treated as an issue of weight of evidence rather than its admissibility. It may be inevitable that the expert will closely work with the client and, indeed, be considered part of its litigation team – though only as an expert, obliged to give their independent opinion, and owing a duty to the Court to do so - **Sweeney v VHI**[209]. None of this is to suggest that the law is not alive to the danger of experts compromising

206 Subject to certain exceptions not here relevant.
207 See McKillen v. Tynan [2020] IEHC 189 (High Court (Judicial Review), O'Moore J, 24 January 2020), Kenneally v. De Puy International Ltd [2016] IEHC 728 2017 2 IR 487 (High Court, Barton J, 13 December 2016) and generally McGrath, Evidence 3rd Ed. 2020 Chapter 6 & in particular §§6.57
208 Day 2 p103 et seq
209 [2021] IESC 58 (Supreme Court, O'Donnell J, 9 September 2021)

their independence – see **Byrne v Ardenheath**[210]. There are cases in which evidence will be excluded – for example, in **Sweeney**, where the expert had been privy to relevant documents confidential to the opposing side when acting for it in other similar proceedings.

96. It does seem clear to me that the purported expert evidence of a party to the proceedings is so fundamentally lacking in independence as to, at least in the very great majority of cases, be inadmissible in evidence. See, for example, **Freeney v HSE**[211] and **Sheeran v Meehan**[212]. Excluding the opinion evidence of Ms Hayes is no criticism of her, nor does it impugn her honesty. It is simply a function of her being, in substance, a litigant in this action.

97. However, lest there be doubt in this regard, her evidence that she had, as an objector, expressed specific opinions to the Board is admissible to prove that the Board was required to consider the issues she had raised and apply its expertise to the task of doing so. That evidence is admissible not by way of lending weight to her opinions for purposes of this litigation, but to establish that those opinions were before the Board for its consideration. Non-expert participants in planning processes are entitled to have their opinions considered by the Board. That is a difference between process before the Board and before a court.

98. As he did not argue that the evidence of Mr Paul and Mr McGann should be excluded, arguably, I need take the matter no further. But it seems to me that fairness to ETI requires some explanation of the position in their regard, as it might seem that admission of their opinion evidence was anomalous given the exclusion of Ms Hayes'. As I have said, the world is not ideal, and a necessary pragmatism must be brought to bear on the question of independence of expert witnesses. Having excluded the parties as expert witnesses, it follows that expert witnesses will be non-parties. Absent a comprehensive practice of retainer of independent experts by the courts, it further follows that expert witnesses must, in the vast majority of cases, be retained by and paid by the parties. In an ideal world that fact alone - of paid retainer - would exclude their evidence. In the real world it cannot and does not and the evidence of experts thus retained is admissible even where the expert in question is regularly retained by, for example, a particular insurance company defending personal injury litigation. Indeed, the possibilities and limits of cross-examination of such witnesses as to their independence were addressed in **O'Driscoll v Hurley**[213]. The regular admission of the evidence of in-house experts is reflected in the Supreme Court's decision in **Galvin v Murray**[214] - though it was not disputed in that case.

99. Nonetheless, independence of their client is required of experts giving evidence. Citing the well-known case of "***The Ikarian Reefer***"[215] and McMenamin J in **O'Leary v. Mercy University Hospital**[216], O'Moore J in **McKillen v. Tynan**[217] cited the following principles of law as to expert witnesses:

> *"(1) The evidence of such witnesses should be, and be seen to be, independent and uninfluenced in form or content by the exigencies of litigation;*

210 Byrne v. Ardenheath Company Ltd [2017] IECA 293 (Court of Appeal, Irvine J, 9 November 2017)
211 Freeney v. Health Service Executive [2020] IEHC 115 (High Court (General), Hyland J, 3 March 2020)
212 2003 WJSC-HC 11471
213 O'Driscoll (minor) -v- Hurley & anor [2015] IECA 158
214 [2001] 1 I.R. 331
215 [1993] 2 Lloyds Reports 68
216 [2019] IESC 48
217 [2020] IEHC 189 (High Court (Judicial Review), O'Moore J, 24 January 2020)

(2) Such witnesses should provide independent assistance to the court by way of objective, unbiased, opinion in relation to matters within their expertise and should never act as advocates;

(3) Such witnesses should state the facts or assumptions upon which their opinion is based, and consider material facts which could detract from their concluded opinion;

(4) Expert witnesses should make it clear when a particular question or issue is outside their expertise;

(5) If such witnesses consider that insufficient data is available, they should say so, and indicate that the opinion is provisional only; and

(6) If the witness is not sure that their report contains the truth, the whole truth and nothing but the truth, without some qualification, they should state that qualification in their report. If an expert witness changes his views on a material matter such change of views should be communicated (through lawyers) should the other side without delay and when appropriate to the court;

(7) Where expert evidence refers to photographs, plans, calculations analyses, measurements, survey reports or other similar documents these must be provided to the opposite party at the same time as the exchange of reports."

100. **O'Moore J** cited O'Donnell J. in **Emerald Meats**[218] as pithily summarising the need for both expertise and independence as follows:-

"In theory, expert witnesses owe a duty to the Court to provide their own independent assessment. It is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the Courts determination."

101. In **Kenneally v. De Puy**[219] Barton J considered an application in a personal injury action to exclude the evidence of an expert who had a financial interest, not in the case in question[220], but in other litigation relating to alleged general problems with the type of prosthetic hip manufactured by the Defendant, one of which the Plaintiff had received and of which she complained. Barton J

- Held that a conflict of interest does not necessarily disqualify an expert from giving evidence – the question is whether the expert opinion is independent. That is to say:
  - within his expertise and
  - the product of the expert uninfluenced as to form or content by the exigencies of the litigation.

Any disqualification from giving evidence on the grounds of a conflict of interest must depend on the circumstances of each case. Where an expert has a financial interest in the outcome of the litigation only rarely will his evidence be admitted.

218 Emerald Meats Limited v. The Minister for Agriculture, Ireland & The Attorney General [2012] IESC 48, at paragraph 28
219 Kenneally v. De Puy International Ltd [2016] IEHC 728 (High Court, Barton J, 13 December 2016)
220 Other than his entitlement to fees for his work as an expert witness.

- Preferred the view that objectivity and impartiality of an expert was something which would generally go to weight rather than admissibility.

- Adopted a summary of the law as follows[221]

> *(1) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.*
>
> *(2) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.*
>
> *(3) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.*
>
> *(4) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether an expert witness should be permitted to give evidence.*
>
> *(5) The questions which have to be determined are whether:*
> *(a) the person has relevant experience; and*
> *(b) he is aware of his primary duty to the Court if they give expert evidence, and are willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.*
>
> *(6) The judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules (which read Rules of the Superior Courts (Conduct of Trials) 2015).*
>
> *(7) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence.*
>
> *Even where the court decides to permit an expert to be called where his independence has been put in issue, the expert may still be cross-examined as to his independence and objectivity."*

102. It is, in my view, an all-but-inevitable commonplace that in planning and environmental judicial review of the grant of planning permissions and other licenses, the application for the permission or license will have been prepared with the assistance – indeed largely by – experts whose affidavits later feature in the developer's opposition in the judicial review. I am unaware of any case in which their evidence has been excluded on that account – and in fairness ETI does not say it should be – or deprived of weight on that account save for specific reason. It is true that, inevitably, such experts generally "stand over" on affidavit their own work in making the relevant application. But it should be remembered – indeed emphasised – that experts making or assisting planning applications owe, to the Board and the public, similar duties of independence and professionalism to those they owe to the courts. So, their "standing over" in judicial review work the

221 Citing paras. 33-29 and 33-30 of Phipson on Evidence and EXP v. Dr. Charles Simon Barker [2015] EWHC 1289 (QB.)

product of that independence and professionalism should be no surprise. The delay and expense in requiring developers to generally retain a new expert team to defend a judicial review - inevitably on short notice – would not be proportionate or justifiable.

103. It is, of course, entirely open to a party to impugn the credibility evidence of expert evidence by reference to alleged conflict of interest or lack of independence but, as **RAS Medical**[222]stipulates, that must be generally done by cross-examination of the expert whose credibility is impugned. That did not occur here. On affidavit and absent such cross-examination it is impossible, at least generally, to ascribe greater or lesser weight to the evidence of any expert as compared to another.

104. I may be guilty of devoting excessive attention to a brief remark by counsel for ETI – whom I in no way criticise in this regard. As has been seen, I am not uncritical of the expert evidence adduced for Cloncaragh. However, it seems to me worthwhile to explain why I cannot, by reference to criteria of expertise and independence, admit the opinion evidence of Ms Hayes – much less give it equal weight to that of the experts for Cloncaragh. Nor am I prepared to prefer the evidence of the experts for ETI over the evidence of the experts for Cloncaragh merely because the latter prepared the planning application. As will be seen later in this judgment, where the admissible affidavit evidence of experts conflict, that conflict falls to be resolved by cross-examination.

Ground 1 - FAILURE TO TRANSMIT THE ETI SUBMISSION TO THE COUNCIL

The Pleadings

105. ETI impugns the Impugned Permission for the Board's admitted failure to send to the Council a copy of ETI's Submission to the Board in a timely manner. Specifically, ETI pleads that:

> *"The impugned Decision is invalid because the Board failed to send to the Council, within 3 working days of expiry of the period of 5 weeks from the receipt by the Board of the application for permission, copies of a submission duly received by it from the Applicant, and thereby failed to comply with Article 302(5)(b) of the 2001 Regulations, and the Council then failed to consider that submission[223] before preparing its report as required by Section 8(5) of the 2016 Act.*
>
> *As a result of the Board's delay in sending the Applicant's submission to the Council, the Council failed, in its chief executive's report, to summarise the points raised in the Applicant's submission, contrary to Section 8(5)(a) of the 2016 Act."*

106. Despite the Board's argument to the contrary, I consider that the Grounds are pleaded sufficiently to underpin the views I express below on this Ground. Not least, the plea that "*the Council*" failed to consider the ETI Submission encompasses their consideration by both its Chief Executive and its elected members. I reject also as entirely unreal the argument that, because ETI in its Grounds misstated the Chief Executive's report as dated 26 June 2021, when in fact it was 24 June 2021, the case should on proceed on the clearly erroneous premise that the Chief Executive had 5 days to consider the ETI Submission, when in fact he had about 2.

222 See below
223 Emphasis added

107. Very properly, the Board accepts that its obligation pursuant to Article 302(5)(b) PDR 2000 to send submissions and observations to the Council is mandatory[224]. But the Board pleads that, as it considered the ETI Submission, its failure is trivial and/or insubstantial (de minimis) and ETI was not prejudiced, such that certiorari is not warranted.

108. The Board pleads that it did (belatedly) send a copy of ETI's Submission to the Council to the Council (by email on 21st June 2021 – in fact at 16:05) a few days before the signing of the Council Chief Executive's Report on 24th June 2021. However, the Board also accepts as a probability, and I would in any event so find, that no consideration by the Council/its Chief Executive of the ETI Submission occurred or is reflected in that report and that, had the EIT Submission been sent to the Council in the ordinary way and without delay, the Chief Executive's Report would have cited it.

109. The Board pleads that ETI has not pleaded prejudice, but ETI pleads that the consequence of the Board's failure was that the Council failed to consider ETI's Submission before preparing its report as required by S.8(5) of the 2016 Act. That plea suffices to identify the prejudice in question.

The 2016 Act Scheme for Consideration of Submissions & Consultation with the Planning Authority

110. As to SHD planning permission applications, the 2016 Act advances the aim of expedition, regulates the making of submissions and observations by members of the public[225], and secures the input of the local planning authority to the Board's consideration of applications by requiring:[226]

- The transmission of copies of the intended planning application documents by the planning applicant to the planning authority before the application is made to the Board[227].

- The rejection of submissions and observations of members of the public made out of time. By S.8(5) and S.9(1) of the 2016 Act, only submissions and observations "*duly received*" are to be sent to the Planning Authority and reported on by it and considered by the Board in making its decision on the SHD planning application. What "*duly received*" means is established by Article 302 PDR 2001[228], which requires that the submission or observation be accompanied by the appropriate fee and made within 5 weeks beginning on the date of receipt of the planning application, failing which, the Board *"shall return … the submission or observations received and the fee and notify the person, authority or body that the submission or observations cannot be considered by the Board."*

- The Board to transmit copies of those submissions and observations to the planning authority "*according as they are received*"[229] but in any event, and as a backstop, within 3 working days of the expiry of the 5-week time-limit for making such submissions and observations[230].

224 Day 2 p176
225 And prescribed bodies – though that is not here relevant.
226 See generally S.8(4)&(5) of the 2016 Act.
227 S.8(1)(b)(i) of the 2016 Act
228 Inserted by article 5 of S.I. No. 271/2017 – Planning and Development (Strategic Housing Development) Regulations 2017
229 S.8(5)(a) of the 2016 Act
230 Article 302(5)(b) PDR 2001

- That the planning authority executive consider the planning application and report on it – including specifically on the submissions and observations of members of the public[231] - to its relevant elected members[232] who may express their views. That implies:
  - Analysis by the executive of the submissions and observations.
  - Reportage of that analysis to the elected members.
  - The opportunity of the elected members to express their views on the submissions and observations and on the planning application more generally in the light of the submissions and observations.

- That the chief executive of the planning authority report to the Board on the planning application:
  - Recording the views of the elected members.
  - Recording the views of the chief executive.
  - Summarising the points raised in submissions and observations of members of the public.[233]
  - Making a recommendation as to grant or refusal of the permission sought and, in the case of grant, recommending planning conditions to be imposed.

111. The chief executive's report typically records the views of the various relevant functional departments of the planning authority – such as planning, water services, heritage and the like - and often, as here, appends their reports. The 2016 Act is specific[234] that the chief executive's views are required on,

- the effects of the proposed development on:
  - the proper planning and sustainable development of the area of the authority,
  - the environment,
  - in both cases having regard in particular to
    - the matters relevant to proper planning and sustainable development specified in S.34(2) PDA 2000. These include such as the development plan, ministerial guidelines[235], Government policy and European Sites[236] and
    - the submissions and observations of members of the public.

- whether the proposed development would be consistent with the relevant objectives of the development plan or local area plan.

112. The combined effect of the relevant time limits[237] is variable depending on when exactly the planning authority receives the copy planning application documents from the planning applicant. The chief executive has 8 weeks from receipt of the documents to report to the Board. Broadly, it is likely that, from the expiry of the backstop for the Board's sending the submissions and observations to the planning authority, the chief executive has less than 3 weeks to report to the Board. Though, doubtless, the report will have been in preparation from receipt of the planning application documents and the planning authority will typically have had a "drip feed" of submissions and

231 S.8(4)(c)(ii)(IV)(A) and S.8(5)(a)(ii) of the 2016 Act
232 As defined in the 2016 Act – essentially, the elected members representing the area in which the site is situate.
233 S.8(5)(a)(i) of the 2016 Act
234 S.8(5)(a)&(b) of the 2016 Act
235 Issued under S.28 PDA 2000
236 i.e. Special Areas of Conservation designated under the Habitats Directive and Special Protection Areas designated under the Birds Directive.
237 S.8(1)(b)(i) and S.8(5)(a) of the 2016 Act and Article 302(5)(b) PDR 2001

observations over time from the Board prior to the expiry of the backstop, this timescale nonetheless represents a demanding requirement - at the very least as to incorporation into the report proper consideration of those submissions and observations coming to hand in accordance with the backstop time-limit.

ETI Submission - Sequence of Events

113. The Board is entitled to consent to electronic receipt of submissions and observations[238] and has in effect given general consent to such receipt by providing on its website a facility to upload such submissions and observations. Accordingly, Cloncaragh's Notice of SHD Planning Application advised the public that submissions and observations could be made to the Board's website[239].

114. In this case, the 5-week time-limit from the Board's receipt of the planning application by which members of the public had to make any submissions and observations to the Board[240] was to expire on 3 June 2021. The Board says that time limit expired at the end of its office hours that day – i.e. 17:30[241]. Nothing turns on the point as, ultimately, the Board accepted the ETI Submission as valid and it accepts that ETI was not at fault[242]. But the 17:30 time-limit does set the context for the sequence of events described below.

115. The ETI Submission runs to 108 pages. Ms Hayes says she relied on the information on the Board's website which, for reasons unknown to me, placed a 30mb limit on the size of submissions and observations which could be uploaded. On 3 June 2021, she rang the Board to advise that she intended to submit a large document. The Board staff member with whom she talked supplied her with the Board's online support e-mail address. Ms Hayes tried to upload ETI's Submission via the Board's web-based facility but failed. It seems that the file constituting the Submission was too big for the Board's system. In any event, Ms Hayes sent the ETI Submission to the e-mail address she had been given by the Board. It was received there at 17:29. However, it was impossible to pay the necessary fee by e-mail and, on ringing the Board, she was told that it could not accept payment over the phone - again, for reasons unknown to me. Resourcefully, Ms Hayes went back to the Board's web-based facility, made a "dummy" blank submission and paid the €20 fee with it. It seems that the fee was received by the Board at 17:36. Later, on 3 June 2021, she sent an e-mail to the Board explaining what she had done and seeking confirmation that the submission had been received. On 7 June 2021, she sent a follow-up e-mail, again setting out what had occurred and seeking confirmation that the submission would be considered.

116. On 8 June 2021, the Board replied to ETI acknowledging receipt of the submission but rejecting it as not "accompanied by" the mandatory €20 fee. The Board also relied on the fact that

238 Article 302(2) PDR 2001.
239 See notice appended to the ETI submission to the Board.
240 Article 302(5) PDR 2001.
241 The Board's adoption of its office hours was approved, obiter, by Kelly J in Graves v An Bord Pleanála [1997] 2 IR 205 as follows: "It is pertinent to point out that there is no statutory definition of the phrase "office hours" as used in s 4 of the Act of 1992. However, the Board has set the hours as being between 9.15 am and 5.30 pm from Monday to Friday excluding public holidays and Good Friday. Notice to that effect was published in the national newspapers in July, 1992 and notices to that effect are situate in the entrance lobby and lift of the building in which the Board's premises are situated. In addition the Department of the Environment has published a leaflet entitled "Making a Planning Appeal" in which those hours are clearly set out at para 3 thereof. A copy of that leaflet containing, inter alia, this information was furnished to Mr Graves' solicitors by the Council as part of the documents sent along with the decision against which Mr Graves wished to appeal."
242 Day 2 p144

the fee had been received out of time at 17:36 - it seems as a matter separate to the issue of its accompanying the submission, though the Board's reply is not quite clear.

117. On 8 June 2021 also, in compliance with the applicable 3 working day time-limit, the Board sent the submissions and observations on the file – but not the ETI Submission - to the Council, where they were received on 9 June 2021.

118. By way of e-mails sent to the Board on 11 and 16 June 2021, Ms Hayes protested the rejection of the ETI Submission – inter alia asserting that the relevant time limit expired at midnight, not 17:30. She also referred to the status of NGOs, under the Aarhus Convention, as to public participation in environmental decision-making and to principles of fair procedures. Further correspondence ensued.

119. At 09:05 am on 21 June 2021, the relevant committee of elected members of the Council sat, inter alia, to hear the Chief Executive's report to it on the Planning Application – including, necessarily, on the submissions and observations thereon by members of the public - and to convey their views thereon to the Chief Executive, to be recorded in his report to the Board. It is clear that this transaction did not include consideration of the ETI Submission by either the Chief Executive or the elected members.

120. By letter of 21 June 2021 to ETI, e-mailed at 15:03, the Board reversed its position as to the validity of the ETI Submission. It had "*decided to take your submission into consideration in its determination in this matter in the interest of equity and fairness as this was due to a technical issue which occurred on the Board's behalf*".

121. By e-mail of 21 June 2021 at 16:05, the Board sent the ETI Submissions to the Council as having been *"omitted in error*". As the Board is obliged to reject and return any invalid submissions[243], those e-mails can only amount to an acceptance by the Board that the ETI submission had, from the start - 3 June 2021 - been validly before the Board.

122. The Chief Executive's Report to the Board was issued on 24 June 2021. It, as required by statute, summarised the submissions and observations by members of the public. Though arguably he was not obliged to do so, he in fact listed each submission by reference to the name of the member(s) of the public who had made each submission[244]. ETI's Submission was not summarised, nor was ETI identified as having made a submission. This mode of summary, whether or not obligatory, had the effect of confirming - and I find as a matter of probability - that:

- the ETI Submission was not summarised to the elected members.
- the elected members did not have, and so did not exercise, the opportunity to consider and express their views on the ETI Submission, or on the planning application in light of the ETI Submission.
- the ETI Submission was not considered by the Chief Executive for purposes of compiling his report.

243 Article 302(4)&(5)(a) PDR 2001

244 The obligation imposed by s.8(5)(a) is to summarise "the points raised", such that it may have sufficed to identify those points as opposed to identifying the members of the public who made them. But I need not and do not so decide.

- the ETI Submission was not summarised by the Chief Executive to the Board in his report.

In fairness, I should record that the Board's statement of opposition fairly acknowledges that *"the Chief Executive's Report does not refer to the Applicant's submission and does not contain a summary by the Council of the Applicant's submission."*

123. As to why exactly these omissions occurred, the additional input of the Council would have been welcome in respect of what happened from 21 June 2021 at 16:05. But in the end, I don't think anything turns on that as the evidence to hand enables me to make the relevant findings of fact.

124. By letter dated 26 August 2021, ETI asked the Council for a copy of its Chief Executive's report to the Board and also, significantly, sought both clarity whether the Council had received ETI's Submission and a copy of the Board's letter sending it to the Council. By response of 31 August 2021 to that specific question, the Council enclosed the Board's letter dated 8 June 2021 sending the submissions and observations of the public to the Council and listing them by reference to the names of the members of the public in question. That list did not include ETI or its submission. A strict interpretation of this response of 31 August 2021 would imply that the Council never got the ETI Submission. The absence of any reference to the ETI Submission in the Chief Executive's report to the Board lends some support to that proposition.

125. However, that proposition is weakened considerably by the e-mail of 21 June 2021 at 16:05 in which the Board sent the ETI Submission to the Council. Despite the absence of an acknowledgment of receipt, I infer on the balance of probabilities that the Board did send the ETI Submission to the Council by the e-mail of 21 June 2021 at 16:05. But I also infer that the ETI Submission had not come to the attention of the relevant personnel in the Council prior to the sending of the Chief Executive's Report to the Board dated 24 June 2021. This may not be entirely surprising as, from receipt of the Board's letter of 8 June 2021 in compliance with the 3-day deadline, the Council had been entitled to expect – no doubt did expect - that no further submissions and observations would be sent to it by the Board. In any event, I infer at least that the Chief Executive's Report was not informed by his or the elected members' consideration of the ETI Submission which, as set out above, statute requires.

126. I should add that the ETI letter to the Council dated 26 August 2021 and the latter's response dated 31 August 2021 were at first not exhibited but were handed in by ETI on the 2nd day of hearing in response to my question whether ETI had made relevant inquiries of the Council. ETI applied to put them on affidavit. The Board objected – as I understood the objection - primarily to the suggestion that the Council never got the ETI Submission and to the suggestion that the councillors had not considered it. As I have said, I take the view that the Council did get the ETI Submission, as the Board says, on 21 June 2021 at 16:05. That addresses the first ground of objection. As to the second, I infer from the content of the exhibited Chief Executive's Report, which does not mention the ETI Submission, that the Board's failure to send the ETI Submission to the Council within the statutory time limit and its having been sent only in the late afternoon of the day on which the Council met from 09:05, had the result as a matter of fact that nether the Chief Executive nor the councillors considered the ETI Submission for purposes of preparation of the Chief Executive's Report. That inference is not dependent on a consideration of the letters to which the Board objected. In any event, I gave ETI liberty to exhibit the letters, which was done by the 4th Hayes Affidavit of 30 June 2022, and they do reinforce the inference I in any event draw.

127. Cloncaragh has drawn attention[245] to issues raised by the Councillors at their meeting of 21 June 2021 but that does not seem to me to affect the issue whether they had had regard to the ETI Submission – even as it related to issues which they, the Councillors, raised.

128. The Applicant specifically pleads that "*[a]s a result of the Board's delay[246] in sending the Applicant's submission to the Council, the Council failed, in its chief executive's report, to summarise the points raised in the Applicant's submission, contrary to Section 8(5)(a) of the 2016 Act*." I find that the Applicant has made out the factual assertion of causation thus pleaded. I find as a matter of probability that the Council's omissions to consider and report on the ETI Submission were caused, at least primarily, by

- the "*error*" of the Board referred to in its own e-mail of 21 June 2021 at 16:05 to the Council,
- the "*technical issue which occurred on the Board's behalf*" referred to in its own e-mail of 21 June 2021 at 15:03 to ETI,
- the consequent failure of the Board, in breach of its obligation[247], to send the ETI Submission to the Council on 8 June 2021 and further delay in doing so until late afternoon on 21 June 2021, the date of the elected members' meeting, and as little as approximately 2 days[248] before the Chief Executive's report was signed on 24 June 2021.

The result of these events was that neither the elected members nor the Chief Executive considered the ETI Submission for purposes of informing the Chief Executive's report and the ETI Submission did not inform that report.

129. If the ETI Submission was valid on 21 June 2021 it had been just as valid on 8 June 2021. It should have been then sent by the Board to the Council. On that view - a view in effect admitted by the Board inasmuch as, on any other view and by Article 302, it would have been obliged to return the submission to ETI and exclude it from consideration in the planning process, and in any event a view which I accept - the Board failed in its duty under Article 302 to transmit the ETI Submission to the Council within the time limited – that is, 3 working days after the expiry of the time-limit for making submissions and observations[249].

The Alleged Absence of Prejudice

130. The Board and Cloncaragh argue that no prejudice to ETI accrued from its error in transmission of its submission to the Council. That was argued on the basis that the Chief Executive's report's summary of those submissions by members of the public which it did summarise was, at most, laconic, and his treatment of AA and EIA had said nothing of substance – simply noting the Board's role as competent authority in those regards[250]. They also point out, and I accept, that the Board itself had, in any event, given full consideration to the ETI Submission.

131. It is notable, therefore, that the scheme of the 2016 Act, as it relates to the Chief Executive's report, is not confined to the task of summarising the submissions and observations of members of

245 Day 2 p139 citing the exhibited minute of that meeting.
246 Emphasis added
247 Under Article 302(5)(b) PDR 2001
248 The e-mail of 21 June 2021 was sent to the Council at 16:05. I do not know when on 24 June 2021 the Report was signed and sent to the Board.
249 Article 302(5)(b) PDR 2001
250 See Inspector's report p33

the public. Indeed, it would be very surprising if the requirement in that regard amounted to such a purely clerical task which the Board, as decision-maker, would be just as well- if not better- placed than the Chief Executive to perform. Clearly, the relevant provisions of the 2016 Act, considered as a whole, are designed to ensure that the submissions and observations of members of the public are not merely recorded in summary by the Chief Executive in his/her report. It is necessary that they be substantively considered by both the Chief Executive and the elected members and incorporated into the formation, and expression in the report, of the views of the Chief Executive and the elected members on the proposed development.

132. This, in turn, implies that the Chief Executive's summary of the submissions and observations of members of the public is not a mere box-ticking or name-checking exercise (which the Board could just as easily do itself). It is designed to reflect a consideration of those submissions and observations and the exercise of planning judgment as to what in those submissions and observations is relevant and weighty – and as to what is neither – applying the Planning Authority's particular local expertise thereto, thereby valuably assisting the Board in its consideration of the planning application.

133. Further, the statutory requirement that the Chief Executive, in forming and reporting his views, consider the effects of the proposed development on the environment having regard in particular to the submissions and observations of members of the public (which often, and in this case, reflect specifically environmental concerns) and the development plan, ministerial guidelines[251], Government policy (many of which reflect specifically environmental concerns) and European Sites[252] (which directly invokes the Habitats and Birds Directives and, by extension, AA) makes it untenable to suggest that the Chief Executive can properly decline to engage substantively with those issues – whether or not on the basis that the Board is the competent authority as to EIA and AA. No more could he/she decline to engage substantively with planning issues on the basis that the Board is the competent authority as to grant or refusal of planning permission.

134. Nor is this an excessively onerous obligation on the Chief Executive when one remembers that local planning authorities are themselves competent authorities, and hence expert, in EIA and AA in contexts other than SHD planning applications and can, at least in general terms, be expected to be familiar with local environmental conditions and local European Sites. Also, what is at issue here is an explicitly strategic (i.e. important) proposal for development in its functional area. I do not suggest that the Council must mimic an AA or NIS or carry out its own detailed investigations for purposes of such reporting. The extent of its obligations are likely to vary with circumstances and are essentially advisory to the Board.

135. I need not, should not[253], and do not make any finding that in this case the Chief Executive's report is in any way legally deficient by reference to the requirements set out above. However, it does not seem to me open to the Board and Cloncaragh to argue, as they do by reference to the content of the Chief Executive's report in this case, that I should infer from that content that the Chief Executive would, had he considered the ETI Submission, not have complied with those requirements and substantively considered and reported to the Board on environmental issues raised by ETI in its submissions as bearing on EIA and AA. I must assume that he and the elected

251 Issued under S.28 PDA 2000

252 i.e. Special Areas of Conservation designated under the Habitats Directive and Special Protection Areas designated under the Birds Directive

253 Not least as the Council was not present at trial for reasons set out above.

members would have properly considered the ETI Submission and that it would have informed their views and report as appropriate.

136. One must remember that[254],

- The planning authority must state whether it recommends that permission should be granted or refused and give reasons for their decision.
- It is by no means unusual for a planning authority – either, or both, of its elected members and executive - to oppose the grant of an SHD permission.
- Invariably, any recommendation in favour of permission is on the basis of recommended planning conditions. If it does recommend conditions, the planning authority must give reasons. It is by no means unlikely that such recommended conditions will address environmental matters.
- Either a recommendation of refusal or the terms of such recommended conditions will necessarily be informed by the expert, impartial, and local knowledge of the various relevant departments of the planning authority (typically, and in this case, relevant departmental reports are appended to the chief executive's report) and may be informed by submissions and observations by the public.
- The statute requires the chief executive to consider the submissions and observations of the public. Not pointlessly, but as appropriate in informing his report to the Board.
- The machinery for the involvement of the planning authority and the requirement that it consider the submissions and observations made by members of the public is laid down in the 2016 Act.
- The Board is obliged by the 2016 Act[255] to consider the chief executive's report in making its decision. Accordingly, it is obliged to consider a report and recommendation which has been informed by both the local expertise of the planning authority and the submissions and observations made by members of the public.
- As was held in **Redmond**[256]:
  - The constitutional and statutory role of the planning authority as to proper planning and sustainable development of and the environmental protection of their functional area and the statutory and impartial status of the planning authority as a consultee in SHD planning applications, imply that the Board, while in no way bound to follow its recommendations, will give the chief executive's report particular weight and attention. Indeed, the Board's obligation to engage with the recommendation in the chief executive's report is considered more obvious than its obligation to engage with its inspector's report.
  - The obligation on the Board, identified by the Supreme Court in **Balz**[257], to address submissions applies, a fortiori, to a statutory consultee such as the planning authority, which is required to submit a formal report in prescribed form to the Board.
  - The Board's consideration of the chief executive's report should be evident in the Board's decision. If the Board grants permission despite a planning authority's recommendation to refuse planning permission, it must be clear to a person reading the Board's decision, in conjunction with its inspector's report, why that recommendation was not accepted.

137. The making of submissions in a planning application is the exercise of a right by the person making the submission[258]. It is the exercise of a right not merely for the benefit of that person but for

254 For much of what follows see generally, Redmond v An Bord Pleanála & Durkan Estates Clonskeagh Ltd & Dun Laoghaire Rathdown County Council [2020] IEHC 151 §95 et seq
255 S.9(1)(a)(i) of the 2016 Act
256 Redmond v. An Bord Pleanala [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §102 et seq
257 Balz v. An Bord Pleanála [2019] IESC 90, [57].
258 Referred to as such in Sweetman -v- An Bord Pleanala & Ors [2020] IEHC 39 (High Court (General), McDonald J, 31 January 2020) §8

the benefit of the community as a whole. Hence, the corpus of law relating to public participation in planning and similar processes and the view of Humphreys J in **Atlantic Diamond**[259] that public interests in environmental protection and good administration - are, in some degree "*crowdsourced*". It is clear that a right to make submissions is a right to make meaningful submissions[260] and to have those submissions considered[261]. In most decision-making processes, the consideration required is by the decision-maker and here the Board did consider the ETI Submissions. However, what is meaningful falls to be considered, inter alia, by reference to the statutory scheme in which the right to make submissions sits. Here, that scheme includes an obligation of consideration, not merely by the Board as decision-maker, but also by the planning authority in whose functional area the Site lies. The views of that planning authority are, as held in **Redmond**, to be given particular weight and attention by the Board. Not merely is the planning authority peculiarly expert in the proper planning and sustainable development of its functional area, but the statutory scheme does not merely require that the planning authority executive consider and give its views on the submissions to the Board. It requires, untypically of planning application procedures, that the views of the relevant elected members be formally sought, inter alia, on the submissions of objectors and conveyed to the Board.

138. Accordingly, it will be apparent that the loss to an objector of the opportunity to inform and affect, by its submissions and observations, the views of both the executive and the elected members of the planning authority, and hence the content of the chief executive's report, is a loss which cannot be dismissed as immaterial, de-minimis, or non-prejudicial - even if the Board in due course itself properly considers those submissions and observations. There can be little doubt that if an objector, by its submission, manages in whole or in part to persuade the planning authority to its views of the planning application, such that the planning authority's imprimatur adds weight to those views as conveyed to the mandatory consideration of the Board, that is a considerable benefit to the objector in its opposition to a proposed development. Of course, it may not ultimately result in a decision by the Board in the objector's favour – but that cannot be assumed in retrospect. Even if the Board's decision goes against the objector, it may be that his/her persuasion of the planning authority will result in a permission in terms (for example as to environmental conditions) different to those in which permission might otherwise have been granted.

139. It follows that depriving the objector of the benefit of the consideration of his/her submission by the executive and elected members of the planning authority is an appreciable prejudice to it which cannot, at least in the ordinary way, be dismissed as immaterial, de-minimis or non-prejudicial. That may, perhaps, be especially so where, as here, the Chief Executive's report recommended a grant of planning permission on conditions. ETI lost the opportunity to persuade him by its submissions to recommend refusal, to express a view on AA and EIA and/or to recommend more demanding planning conditions.

140. Accordingly, in my view, exclusion of ETI's Submission from that process within the Planning Authority represents a prejudice to ETI as it was deprived of the opportunity to influence the views of the Chief Executive and of the elected members, whose views might in turn and by the Chief Executive's report, have influenced the Board in deciding the SHD Planning Application.

259 Atlantic Diamond Limited V An Bord Pleanála & EWR Innovation Park Limited [2021] IEHC 322
260 See generally, Simons on Planning Law 3rd Ed'n (Browne) §13-109 et seq
261 See generally, Simons on Planning Law 3rd Ed'n (Browne) §13-54 et seq

141. I have considered the Board's argument that submissions by other members of the public[262] were considered and summarised by the Council in making its report to the Board and that those submissions overlapped much of the content of the ETI Submissions as to, for example, risk to the European Sites posed by the hydrocarbon-contaminated nature of the Site. One might analogise here the law that an Inspector's report can group and deal with objections and submissions thematically rather than by reference to the names of the individuals making the objections and submissions. Indeed, it seems to me, obiter, that the Chief Executive might have done likewise in his report though, as it happens, he did not. His listing of the individuals making the objections and submissions in this case has, as it happens, assisted the resolution of the factual question whether the Council considered the ETI Submission at all. It did not.

142. A thematically-arranged report on objections and submissions may, depending on circumstances, permit an inference that a particular submission on those identified themes was in fact considered. That is not the same as absolving (and in my view thematic reporting does not absolve) the reporter from in fact considering all such objections and submissions. Here, as a matter of fact ETI's were not considered by the Council. As Simons says[263], "*a participant in a planning process might feel particularly aggrieved if they feel that a submission was not properly considered or taken into account*" citing **North Wall Quay**[264] to the effect that that fair procedures required not only that an opportunity to make submissions be given, but that those submissions be actually considered. Simons says[265] that, in general, the decision-maker is obliged to consider all submissions – citing **Balscadden**[266] to the effect that ***"****The board is of course obliged to consider all submissions received …".* In **O'Brien**[267] Costello J said "*… the Board is required to consider any submissions or observations validly made in relation to the environmental effects of the proposed development …*". As I have said, in the particular statutory scheme at issue here, the obligation of consideration of submissions extends to the planning authority as well as to the Board. Here the Board's error in not sending the ETI Submission to the Planning Authority in a timely manner, as required by the statutory scheme, prevented such consideration.

143. I have considered the Board's reliance on **Wexele**[268] - in which Charleton J said:

> *"Fundamentally, if a complaint is made that an applicant was shut out of making a submission, that party must show that they have something to say. What they have to say must not be something that has already been said. Nor can it be a reiteration in different language of an earlier submission. If a party is to meet the onus of alleging unfairness by the Board in cutting them out for making a submission they must reveal what has been denied then, what they have to say and then discharge the burden of showing that it had been unjust for the Board to cut them out of saying it."*

Wexele was very different to the present case. It was a case of judicial review by a disappointed planning permission applicant complaining that the Board had not circulated a third-party submission to it for response. It was a complaint of unfair procedures in the exercise of a statutory discretion to circulate[269]. In the present case we are concerned, rather, with a failure to follow statutorily mandatory procedures.

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262 I was referred to submissions by Mary Duggan and Seamus Bergin and by Donal and Edwina Allen.
263 Simons on Planning Law 3rd Ed'n (Browne) §13-54
264 North Wall Quay v Dublin Docklands Development Authority [2008] IEHC 305, Finlay Geoghegan J.
265 Simons on Planning Law 3rd Ed'n (Browne) §13-55
266 Balscadden Road SAA Residents Association Ltd and Morris v An Bord Pleanála and Others [2020] IEHC 586 §31
261O'Brien v. An Bord Pleanála & Draper [2017] IEHC 733 (High Court, Costello J, 19 December 2017)
268 Wexele v An Bord Pleanála 05/02/2010
269 S.131 PDA 2000

144. ***Monaghan UDC v Alf-a-Bet***[270], applies here:

> *"… what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the de minimis rule… and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."*

In my view, the error here has not been shown by the Board, which bears the onus of so showing, to be so trivial, technical, peripheral or otherwise so insubstantial, that it can be overlooked on the basis that the prescribed obligation has been substantially, and therefore adequately, complied with. I therefore reject the Board's submission to that effect.

145. The Board cited **McAnenley**[271] for Kelly J's somewhat diffident obiter that, in a case of a failure in a mandatory obligation by a planning authority to transmit documents to the Board for purposes of a planning appeal, ***"****in an appropriate case* certiorari *might be withheld as a matter of discretion, if that were the only* lacuna *involved and no injustice would result".* The primary and striking significance of **McAnenley**[272] is that Kelly J found that the Council had breached its obligation to transmit to the Board a copy of its decision – the order of the county manager – even though the Board had copy of the council's notification of decision to grant permission which included all of the material contained in the decision itself. Kelly J refused to excuse the breach as de minimis, saying:

> *"It is difficult to treat non-compliance with an express statutory requirement on a de minimis basis. The notification of a decision of a planning authority will in all cases contain the essence of the decision itself. Notwithstanding that, parliament has ordained that both should be provided to the respondent. I cannot disregard this statutory requirement."*

That, in my view, disposes in this case of the Board's argument that its breach itself was de minimis.

146. As I understood it, there was a second wing to the Board's de minimis argument – that even if the breach were not de minimis, its consequences were de minimis such that I should refuse certiorari as a matter of discretion. Kelly J's observation in **McAnenley** as to a discretion to withhold certiorari was obiter as he found that other documents of greater substance had likewise not been transmitted to the Board. However, for present purposes it will be apparent, from the view I have set out above as to prejudice, that I am not prepared to hold that in this case it can be said, with confidence sufficient to withhold certiorari on a discretionary basis, that no injustice to ETI resulted from the matters of which it complains under this Ground.

147. As to the de minimis issue, I have been referred also to **Southwood Park**[273]. It differs in its particulars from the present case, but I respectfully find support for my approach in this case in the view of Simons J, in rejecting a de minimis argument by the Board, that the breach in that case undermined public participation in the planning process. So too here, albeit in a different manner. In

270 Monaghan Urban District Council v Alf-a-Bet Promotions Ltd [1980] ILRM 64 at 69
271 McAnenley v. An Bord Pleanála [2002] 2 I.R. 763
272 Indeed, as recognised in later decisions – see below.
273 Southwood Park Residents Association -v- An Bord Pleanála & ors [2019] IEHC 504 (High Court, Ireland - High Court, Simons J, 10 July 2019)

citing **Monaghan UDC v Alf-a-Bet,** Simons J observes that *"The jurisdiction of the courts to excuse or waive a breach of a procedural requirement which has been prescribed by legislation is severely limited".* He also observes that *"The breach in McAnenley was fatal even in circumstances where the content of the one of the missing documents, i.e. the planning authority's decision, was available in an almost identical form. This has an obvious resonance with the present case."* True, one should not oversimplify the decision in **McAnenley**, in which there were other factors at play. But I do share the view of Simons J as to its resonance.

148. The breach in **Southwood Park** consisted of the failure to put on the statutory website[274] an expert report on a bat survey and mitigation measures to benefit bats. An earlier version was put on the website than the version submitted with the planning application[275]. Simons J held that the breach undermined public participation – public participation which is important[276] and must be effective[277] - in the planning process because the applicant for judicial review, inter alia, was deprived of the opportunity to consider and make properly informed submissions on the bat issues. It seems to me that the same logic applies where an objector avails of the right to make submissions on a planning application, but those submissions are not considered by those whose consideration of them is a statutory requirement. While I would be so satisfied in any event, having regard to the place and significance of the planning authority in the SHD statutory scheme and as to the proper planning and sustainable development of its functional area, I am particularly satisfied that that logic extends, in an SHD planning application, to consideration of the objector's submissions by the planning authority, even though the planning authority is not the decision-maker.

149. The Board in **Southwood Park** argued that the differences between the earlier and later bat reports were minimal. A similar argument is made in this case that the other submissions by members of the public, which the Council did consider, covered essentially the same ground as the ETI submission such that, in effect, the Council had considered the issues ETI was entitled to have it consider. Under the heading "Discussion", Simons J rejected the Board's analogy, in making that argument, with case law in respect of the Board's discretion to end exchange of submissions - **Wexele**[278] was not cited but appositely could have been. Simons J replied that the relevant regulation was emphatic and compliance with it was not discretionary. Simons J considered that *"Where judicial review proceedings are brought alleging a failure to comply with fair procedures, then it might be appropriate for the court to consider the content of the documents .."* but:

> *"The legal position is entirely different where, as in the present case, the decision-maker has no discretion. In such circumstances, it is inappropriate for either the decision-maker, or for the court, to embark upon a detailed examination of the content of the material with a view to determining whether or not it is significant or otherwise. This is because the Oireachtas has ordained, albeit mediately through Ministerial Regulations, that all documentation in respect of a planning application must be posted on a dedicated website. In truth, therefore, the position is closer to that analysed by the High Court (Kelly J.) in McAnenley (see paragraph 36 above). It will be recalled that the breach in McAnenley was fatal even in circumstances where the content of the one of the missing*

274 Article 301(3) PDR 2001

275 The first report had identified the need for a further survey during the following summer. The second report was an updated report to reflect the results of that summer survey and mitigation measures revised on foot of it. Only second was lodged with An Bord Pleanála. Only the first was put on the website.

276 See §54 to the effect that public participation is important

277 See §47 as to the requirement that public participation be effective

278 Wexele v An Bord Pleanála 05/02/2010

documents, i.e. the planning authority's decision, was available in an almost identical form."

150. Simons J rejected also the Board's argument, based on **Altrip**[279]. Altrip, in asserting that not all procedural errors invalidate a decision, was to be understood in its context of an issue as to locus standi to engage in environmental litigation. It could not be read across to the general standard of review[280]. In the context of the Board's acceptance that Irish planning law protects public participation as much as does European environmental law, Simons J considered that the following from Altrip - emphasised since in **Protect Natur**[281] - was the general principle:

> *"48. Moreover, given that one of the objectives of that directive is, in particular, to put in place procedural guarantees to ensure the public is better informed of, and more able to participate in, environmental impact assessments relating to public and private projects likely to have a significant effect on the environment, it is particularly important to ascertain whether the procedural rules governing that area have been complied with. Therefore, as a matter of principle, in accordance with the aim of giving the public concerned wide access to justice, that public must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by that directive."*

151. Under the heading "Decision", Simons J in fact did compare the two bat reports and found that the differences could not be discounted as insubstantial or de minimis. I find it somewhat difficult to place that exercise precisely in the context of the extracts from the judgment set out above. I would not read much into the respective headings "Discussion" and "Decision". Headings in a judgment are an aid to its navigation but not circumscriptive of the following content. A judgment must be interpreted as a whole – see **Clonres**[282]. The headings are, in their effect, similar in status to headings or marginal notes in a contract or in a statute. S.18 of the Interpretation Act 2005 excludes marginal notes from informing interpretation of statutes. While judgments are not to be interpreted as if statutes (see **Clonres**), that does not of itself imply that their interpretation should much differ as to the status of headings. Commercial contracts commonly expressly exclude headings from informing their interpretation. Even absent such express exclusion they are of some but not great, weight: see **Cott v Barber**[283], **National Farmers' Union v Dawson**[284], **Navrom v Callitsis**[285] and **Banco San Juan v Petróleos de Venezuela**[286]. Indeed, the practical utility of headings in judgments as aids to navigation would be much diminished if their typically shorthand terms were to be elevated to the status of interpretive aids. In fairness, no-one argued the contrary but as **Southwood Park** was opened it seems to me useful to address this issue.

152. I have considered whether the correct interpretation of **Southwood Park** might be that the comparison of the two bat reports under the heading "Decision" may have been the disposal of the de minimis issue and the earlier treatment under the heading "Discussion" have related to the identification of the breach. It is true that comparison of the bat reports was by reference to the de minimis issue. But so too was the treatment under the heading "Discussion". Under that heading,

279 Case C 72/12
280 Under Article 11 of the EIA directive.
281 Case C-664/15, judgment of 20 December 2019
282 Clonres CLG v. An Bord Pleanala [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021)
283 Cott UK Ltd v F E Barber Ltd - [1997] 3 All ER 540
284 National Farmers' Union Mutual Insurance Society, Limited V. Dawson. - [1941] 2 K.B. 424
285 Navrom v Callitsis Ship Management SA, The Radauti [1988] 2 Lloyd's Rep 416, CA.
286 Banco San Juan Internacional Inc v Petróleos de Venezuela SA - [2021] 2 All ER (Comm) 590 and see generally Lewison on Interpretation of Contracts, 6th Edition §5.13

first, the breach was summarily identified in §33. All that remained thereafter was the de minimis issue which §34 et seq clearly address and the rejection of the invitation to compare the bat reports at §38 was clearly in that context. And, as I have said, at §42 it was specifically recalled that *"the breach in McAnenley was fatal even in circumstances where the content of the one of the missing documents, i.e. the planning authority's decision, was available in an almost identical form."*

153. Simons J also pointed out[287] that there had been no assessment by the Board of the significance or otherwise of the difference between the two documents in respect of which curial deference might be applied. The same is true here in that the Board did not compare the submissions sent to and considered by the Council to the ETI Submission which the Council had not considered and so the Board did not decide whether or not and in all substantial respects (which, incidentally, are not confined to the issues pleaded in the other grounds on which judicial review is sought in these proceedings) they coincided. As the comparison needs to be as to the planning significance of the similarities and differences as between the various submissions, at least in the first instance it should have been done by the Board.

154. That said, I have considered the Duggan and Bergin submission and the Cantillon submission to which counsel for the Board drew my attention. Submissions are not neutral documents – they are intended by their authors as exercises in persuasion and objectors are entitled to have them considered as such. In that respect, and even where they treat of the same issues, some are better than others and they invariably differ in emphasis and mode of expression. While my analysis is inevitably somewhat impressionistic, and as it relates to the specific content to which the Board drew my attention, it is no disrespect to the Duggans and Cantillons to say that I do not think ETI must be expected to be satisfied that the Council's consideration of those submissions is an adequate substitute for its statutory, mandatory consideration of the ETI Submission. For example, the Duggans and Cantillons do not address the issue of direction of groundwater flow raised in the ETI Submission. While I have, below, excluded that issue as a ground in itself for judicial review, as it is not pleaded, it is a difference between the ETI Submission on the one hand and the Duggan and Cantillon submissions on the other which can properly be considered in assessing whether the breach of which ETI complains in Ground 1 is, as the Board suggests, de minimis. While doubtless there is much overlap, the ETI Submission included appreciably more forensic analysis of the hydrology/hydrogeology issues and specific documents such as the URS report the Water Impact Assessment Report and caselaw.

155. The Board also cites **Hickey**[288] **-** in which the Board exercised its discretion to issue a statutory notice to the applicant for judicial review which gave her 13, rather than the required 14, days to make a submission. She in fact made her submission within the 13 days and participated effectively in the process, despite which she relied on the error as a ground in judicial review. Smyth J applied Monaghan UDC v Alf-a-Bet in deeming the error de minimis. It is clear that in Hickey public participation was not undermined, as it was in Southwood Park and in this case. Whether a breach and its consequences are de minimis will often turn on the particular facts of the case, and the facts in Hickey are far from similar to the facts in the present case.

287 §43
288 Hickey v An Bord Pleanála [2004] IEHC 226

156. **Dalton**[289] provides an illustrative comparator as to what may and may not be considered de minimis: in that case a planning appeal was lodged in the name of "*Brendan Dalton for residents St. Michael's Cottages*". In breach of S.127 PDA 2000, the residents were not named, and the Board's invalidating of the appeal was upheld by McDonald J despite a de minimis argument. I consider the error in this case, and its consequences, to be of a greater order than the error in **Dalton.** McDonald J also helpfully reviewed the authorities. He cited the obiter by Finlay Geoghegan J in **O'Connor**[290] as being of great assistance, given the very careful consideration which she gave to the issue. She held that where a statutory requirement (in that case, to state the address of the applicant for permission) was "*truly mandatory…[i]It follows from this conclusion that neither the Court nor the respondent may excuse non-compliance with the requirement in s. 127(1)(b) that the appeal state the address of the appellant on a de minimis basis."* She agreed "*with a similar view expressed by Kelly J. in McAnenley….*". Significantly, Finlay Geoghegan J in **O'Connor** took the view, citing **ESB v Gormley**[291], that "*It also follows from this conclusion that the Court has no discretion to excuse non-compliance with the requirement to state the address in s.127(1)(b) of the Act of 2000 on the basis of an alleged absence of prejudice to the applicant or any other person."* Again, I consider the error in the present case, and its consequences, to be of a greater order than the error in **O'Connor.** In a similar vein, McDonald J cited **Graves**[292]**, McAnenley** and **Southwood Park** - the latter for Simons J's observation that the jurisdiction of the courts to excuse or waive a breach of a procedural requirement of planning law prescribed by legislation is "*severely limited*". McDonald J distinguished **Murphy**[293], in which the de minimis rule was applied, as decided on very particular facts and on the basis of substantial compliance with the relevant regulation. McDonald J, before citing Monaghan UDC v. Alf-a-Bet, observed that:

> *"In order for the de minimis principle to be applied, it must be clear that the failure to comply with the relevant statutory obligation is of a trivial or insubstantial nature. If, however, there has been a complete failure to comply, I cannot see how there is any scope for the application of the de minimis principle."*

And later:

> *"In light of the approach taken by the Supreme Court in the Monaghan UDC case, it is clear that, absent substantial compliance, the de minimis principle is not capable of application."*

157. In my view, and despite the belated provision of the ETI Submission to the Council, the present case is, in its practical consequences, a complete failure to comply with the relevant mandatory requirement such that the object of provision the ETI Submission to the Council, that the Council would consider and report on the submission to the Board, was completely frustrated. One might call it a case of insubstantial compliance. In such circumstances, I apply the observation of McDonald J that he could not see how there is any scope for the application of the de minimis principle.

158. I have considered the **Ballyedmond**[294] case cited for Cloncaragh. It was essentially a fair procedures/natural justice case, as opposed to a case about non-compliance with mandatory statutory requirements. Indeed, Clarke J made that very point in entering a caveat to the proposition

289 Dalton v. An Bord Pleanala [2020] IEHC 27 (High Court (General), McDonald J, 28 January 2020)
290 O'Connor v. An Bord Pleanála [2008] IEHC 13
291 Electricity Supply Board v. Gormley [1985] I.R. 129, at pp. 156, 157
292 Graves v. An Bord Pleanála [1997] 2 I.R. 205
293 Murphy v. Cobh Town Council [2006] IEHC 324
294 Lord Ballyedmond v Commission for Energy Regulation [2006] IEHC 206

that he should take an overview of the process when considering its fairness and he did so in terms which, in my view, apply here:

> *" …. where the statute itself (or instruments made under it) mandates any particular form of procedure then, of course, that procedure must be followed. Any significant and unauthorised deviation from a procedure mandated by statute could not be ignored by the court."*

159. Finally, lest there be doubt, and as the excerpt above from **Ballyedmond** states[295], the same **Monaghan UDC v Alf-a-Bet** principles apply to obligations made mandatory by regulation as those made mandatory by statute.

Conclusion as to Ground 1 - Failure to send the ETI Submissions to the Council in Time

160. For the reasons set out above, the Impugned Permission must be quashed by reason of the Board's failure to comply with its obligation to send the ETI Submission to the Council within the relevant time limit.

161. Lest there be doubt on the issue, I observe that this decision does not purport to quash the Chief Executive's Report, nor is my decision dependent on doing so. While I need not find that their nature is such that such Chief Executive's Reports are not susceptible to quashing in a suitable case, for present purposes it suffices to say that they are an interim step in a planning process, not decisive of rights or obligations, in which the operative decision is that of the Board.

162. I will await argument on the question whether this finding should result in certiorari simpliciter or in certiorari and remittal to enable the Council to consider the ETI Submission and its Chief Executive issue a new report to the Board and what, if any, directions should be given as to the terms of any such remittal.

Ground 2 - CONFLICT BETWEEN PLANNING APPLICATION DRAWINGS

163. The factual essence of Ground 2 as pleaded on the issue of conflict between the drawings is that:

- *The plans as submitted are inconsistent. The architectural plans show a basement floor level of 10m AOD ……. The height of the building is calculated from this datum.*
- *The engineering plans show a floor level of 11m AOD ……. The depth of excavations and all environmental calculations in relation to potential impact on groundwater are based on this calculation.*

295 See also Sweetman -v- An Bord Pleanala & Ors incl IGP Solar 8 Ltd [2020] IEHC 39 (High Court (General), McDonald J, 31 January 2020) §18 et seq

- *Either the building will be 1m higher than the architects propose, altering the impact on its surroundings, or it will be 1m deeper than the engineers propose, altering its impacts on groundwater.*

- *The plans do not show the elevations accurately, and the particulars are inadequate to describe the impacts on bedrock and groundwater because of the inconsistency.*

164. Attributing legal significance to these facts, the Grounds plead breach of:

- S.4(1)(a)(iv) of the 2016 Act - which requires submission with the planning application of such documents as may be prescribed.
- Article 297(4) PDR 2001 – which prescribes submission of such plans and particulars, including floor plans complying with article 298, as are necessary to describe the works.
- Article 298(1)(c) PDR 2001 – which prescribes that plans show the level of the proposed structures relative to Ordnance Survey datum.

165. ETI also argued[296] that, as Condition 1 of the Impugned Permission required that the proposed development be completed in accordance with the plans and particulars lodged, and as those plans and particulars were internally inconsistent as to Basement FFL, compliance with Condition 1 would be impossible and/or the Impugned Permission was void for uncertainty. These arguments were not pleaded and so could not form a basis for certiorari but nonetheless served the useful purpose of drawing attention to the issue of interpretation of the Impugned Permission.

166. While the Board's and Cloncaragh's Opposition papers[297] unhelpfully and untenably denied it and verified those denials, and the expert affidavits initially sworn for Cloncaragh regrettably failed to properly acknowledge it, it was ultimately agreed by all, and to my mind was obvious from the start of these proceedings, that there was indeed a discrepancy between the architect's drawings and the engineer's drawings as to the finished floor level (also termed the formation level) of the Basement Car Park floor. The real issues were as to the cause, effect and significance of that discrepancy – not as to its existence.

167. As has been seen, the engineer for Cloncaragh, in his 2nd affidavit, swore that his drawings were correct and blamed the architect for the discrepancy by way of a somewhat unlikely and euphemistic "*typographical*" error. A typographical error occurs when one intends to type one thing and, by a slip of the finger or the like, one types another. It is a synonym for misprint. It is by no means clear that that is what occurred in this case. It was suggested in argument, though not put in evidence, that the Architect depicted levels from the planning application refused in 2019 and due to his/her error failed to depict levels referred to in the engineering drawings as "amended". While that is not unlikely, such an error is not typographical. Indeed, the very fact that the level was 10m OD in the earlier application suggests that the error was not typographical. It may have occurred for a variety of reasons. For example, there may have been a failure to inform the architect of the change in levels such that, for all we know, the Architect perfectly deliberately submitted plans based on the levels they depict. The use of euphemisms in affidavits in place of straightforward acknowledgment followed by real explanation of error does not assist or inspire confidence. In

296 Day 2 p31
297 Board's Statement of Opposition §23; Cloncaragh's Statement of Opposition §20

judicial review it is expected that all parties will present all their cards "*face up*"[298]. However, in the end, my decision does not turn on this issue.

168. The discrepancy is, as I say, both simple and obvious: though obvious only with hindsight as it was understandably missed by all of Cloncaragh, its design team, the Board's inspector, the Board and ETI until spotted at some point after the Impugned Permission was granted and in the process of preparing for judicial review. I say "understandably" not merely as my sight is hindsight but as to say otherwise would be to make the mistake of viewing the discrepancy as magnified through the lens of the present dispute.

169. As recorded above, the engineer's drawings and accompanying reports and other engineer's documents proposed a basement car park FFL as "*amended to*" 11m OD. The equivalent figure in the architect's drawings was a metre lower at 10m OD[299]. However, I am satisfied that the engineer's drawings and architect's drawings are ad idem as to the ground floor levels from which building height is measured. For that purpose, counsel for the Board compared, and as to ground floor level demonstrated to my satisfaction the consistency between, engineer's drawing 18-104-7[300] and architect's drawings 1232-17-14[301] and 1232-17-05A[302]. Counsel for ETI agrees that the architect's and engineer's drawings agree as to ground floor levels[303]. This means that the discrepancy as to the basement FFL does not affect the height of the buildings above ground floor level. I accept that, regardless of the discrepancy, the permission is for buildings of the heights stipulated in the architect's drawings. In any event if, as I find below, the planning permission is to be interpreted as based upon the engineer's drawings as to the Basement FFL, neither of the consequences pleaded in the Statement of Grounds will ensue: the building will not be higher than proposed nor will the basement and its excavations be deeper than proposed.

170. As compared to the architect's drawings, the engineer's drawings do provide for a higher excavation formation level and basement FFL and so for a basement floor to ceiling height of about 1m less than that in the architect's drawings. That appears to me to be the correct interpretation of the Impugned Permission as to the internal height of the basement. Neither that outcome nor any legal or regulatory consequences of it has been pleaded or canvassed in evidence by the Applicant. I cannot assume any such consequences.

171. Cloncaragh's engineer stands over that reduced basement floor to ceiling height. Cloncaragh argues, correctly, that I need not concern myself with whether that reduced basement floor to ceiling height complies with Building Regulations[304]. If it does not, Cloncaragh will be unable, in any event, to build on foot of the Impugned Permission.

172. As far as was made known to me, only the architect's drawings stipulated a basement FFL of 10mOD. All other documents in the planning application, insofar as they stipulated or assumed a basement FFL, conformed to the engineer's drawings stipulation of a basement FFL of 11mOD – my

298 See Gray, The Duty of Candour and Third Parties [2010] JR 149, cited in Fordham, Judicial Review Handbook 6th Ed'n §10.4.4
299 On their face the Architect's drawings post-dated the engineer's but I do not think that signifies.
300 Typical Sections to Stormwater Attenuation System
301 Ground Floor Plan and Landscape
302 First Floor Mezzanine but showing levels of all floors in all buildings in a diagram in the top right-hand corner of the drawing.
303 Day 3 p244
304 Though counsel did not expressly cite it, in effect he relied on S. 34(13) PDA 2000 – "A person shall not be entitled solely by reason of a permission under this section to carry out any development."

attention was drawn to the Construction Management Plan[305], the Groundwater Management Plan[306] and the Soil Management Plan[307]. ETI itself submits that the NIS assumes the engineering drawings to be correct (so, ETI argues, underestimating the depth of excavation and hence risk of pollution of groundwater). While by no means is the interpretation of the planning application a "numbers game" in the sense of counting the number of quantified references to Basement FFL, and deeming 11mOD the winner accordingly, nonetheless the repeated statement of a basement FFL of 11mOD as compared to one statement of a basement FFL of 10mOD is striking. Further, the fact that the engineering drawings explicitly refer to the 11mOD level as "*Basement FFL Level Amended To 11.00m*" at least suggests that, of the options, 11m is the more up-to-date, and hence correct. While the architectural drawings post-date the engineering drawings, they do not refer to any amendment of the basement FFL (to 10mOD from the 11mOD figure in the engineering drawings) and seem to me, in any event consistent with the architect, for whatever reason, failing to update the drawings to reflect the amendment of the basement FFL to 11mOD as recorded in the engineering drawings. In short, while architect's drawings are of high importance in any planning application and in this one, in this case the net and clear impression from the Planning Application - interpreted as a whole, and on **XJS** principles[308] as if by an intelligent, informed, inexpert layperson - is that, as to the specific issue of Basement FFL, the architect's drawings are an outlier and in error and the engineer's drawings are correct in stipulating a basement FFL of 11mOD.

173. What is very clear is that the Inspector, having missed the discrepancy[309], analysed the application and, in adopting her report, the Board granted permission, on foot of the engineer's drawings and other documents in the application, based on a basement FFL of 11mOD. The relevant content of the Inspector's report reads as follows:

> *"10.8.3 Groundwater Management Plan:*
>
> *In response to the previous reason for refusal the applicant has submitted with the current application a 'Ground Water Management Plan (Basement Construction Phase) ……*
>
> *……. groundwater is present across the majority of the site at elevations of between 9.4mOD and 10mOD ……*
>
> *The proposed basement has a formation level of 11mOD. Beneath the basement a series of surface water and foul drainage sewers and attenuation tanks are proposed. These will generally be placed at invert levels[310] of between 10.2mOD and 10.4mOD but extending to 8.9m and 9.3m for the stormwater attenuation tank. Page 13 states that assuming the basement construction and foundations will comprise an approximate thickness of 950mm, it is estimated that basement excavation formation level will approximately be 10mOD. This indicates a likely positive groundwater head of up to +2m in the north-western corner of the site above the base of the excavation with the majority of the basement exaction[311] above the average groundwater level suggesting a dry excavation. Groundwater control will be required in localised areas of the site where the deeper stormwater attenuation tank will be constructed in order to maintain a dry excavation and enable basement and drainage construction. The stormwater attenuation tank will be*

305 2.12 FOUNDATION CONSTRUCTION - The Basement finished floor level is 11m above ordnance datum, (AOD). and drawing just below. Also, Secant Piling Section Detail at p13
306 §4.1 The proposed basement for the redevelopment has a formation level of 11mOD.
307 §5.1 The proposed basement for the redevelopment has a formation level of 11mOD.
308 See, for example, Ballyboden Tidy Towns Group v. An Bord Pleanala [2022] IEHC 7 §119 et seq
309 As one must infer: doubtless had she noticed it she would have referred to it.
310 Invert level describes the level of the internal bottom of a pipe, chamber or the like.
311 Sic. This clearly should read "excavation".

below rest groundwater level and therefore an appropriate waterproofing design will be required to ensure no ground water ingress into the attenuation tank or drainage infrastructure on completion."

174. In **Ardragh Wind Farm**[312] Simons J observed that "*The courts apply a pragmatic approach to the interpretation of planning decisions"* and in that context approved a "*commonsense analysis*". Further, an intelligent, informed, inexpert, layperson is capable of resolving inconsistencies, errors, contradictions and the like in and between planning documents – see also **Dublin Cycling**[313]. Though, doubtless, there are limits to that principle, they are not breached on the facts here.

175. Applying **XJS** principles of interpretation of planning permissions in light of all relevant documents including, in particular in this case, the excerpt from the inspector's report set out above, I conclude that:

- The inspector arrived at the correct interpretation of the Planning Application – whether through inadvertence to the discrepancy is irrelevant.

- Properly interpreted the impugned permission:
  - requires a basement FFL of 11mOD as per the engineer's drawings.
  - requires a basement floor to ceiling height as per the engineer's drawings.
  - requires ground floor levels and hence building heights as per the architect's and engineer's drawings, which agree in this respect.
  - does not imply excavation deeper than that envisaged in the engineer's drawings and so is not inconsistent with the analysis in the AA insofar as it assumes excavation levels.

- The Planning Application included plans and particulars accordingly in compliance with the relevant regulations[314].

- In addition to those plans and particulars, the Planning Application also included architect's drawings at variance with the foregoing in stipulating a basement FFL of 10mOD. However, that does not:
  - gainsay the inclusion of plans and particulars in compliance with the relevant regulations and according with the permission as granted.
  - prevent an interpretation of the application and hence a substantive permission in accordance with my interpretation above.

- The Basement FFL discrepancy is on an issue of considerably greater engineering than architectural significance. That would be readily apparent to the intelligent, inexpert layperson attempting to resolve the discrepancy and tend him/her to preferring the engineering rather than architectural drawings. Indeed, ETI's own case as to the practical effects of excessive excavation depth and its consequences was in essentially engineering terms.

176. The Impugned Permission is to be interpreted as stipulating a Basement FFL of 11mOD because, if the reader considered the plans and particulars ambiguous in that regard, that ambiguity

312 Ardragh Wind Farm Ltd v. An Bord Pleanála [2019] IEHC 795
313 Dublin Cycling Campaign CLG v. An Bord Pleanala [2020] IEHC 587 (High Court (Judicial Review), McDonald J, 19 November 2020)
314 A separate issue arises as to secant pile elevations to which I will turn in due course.

is clearly resolved in that, as I have said, it is clear that the Inspector explicitly, and hence the Board implicitly, proceeded and granted permission on the basis of a Basement FFL of 11m OD. Save, of course, to any extent the Board rejects it, recourse may be had to the inspector's report in interpreting a planning permission. I have already cited **Eoin Kelly**[315] to the effect that *"… the Board order and the board direction can be read with the Board inspector's report …"* - see also **Dublin Cycling**[316]. As counsel for the Board put it, *"it is perfectly clear what the Board decision means because it is perfectly clear what the Board and Inspector did."*[317]

177. I should add that the issue here is not the application of a de minimis rule as to the omission of necessary plans and particulars. Here, the necessary and accurate plans and particulars were supplied. The question rather is one of interpretation of the planning application as a whole – including, but not limited to, the drawings conflicting as to Basement FFL. They do create an ambiguity – but one which, in my view, is resolved on the basis set out above. As counsel for Cloncaragh pointed out[318], in law and unless it is void for uncertainty, even an ambiguous planning permission has only one meaning and it is the court's job to discern it – as I have done. I would add that an ambiguity in a planning permission is not lightly to be considered incapable of resolution – that view proceedings from the presumption of validity of the permission, XJS principles of their interpretation and the pragmatic and common-sense approach to interpretation described by Simons J in Ardragh. In my view planning permissions are even more suited to the application of such principle than are contracts and a contract is declared void for uncertainty only as a last resort - **Kirby v Express Bus**[319] and **Lewison**[320].

178. In the end, what matters in this case is not what the Cloncaragh intended to apply for: what matters is what, objectively, they got by way of a permission. And counsel for ETI very properly accepted that the Board thought it was dealing with an application based on a Basement FFL of 11m OD and issued its grant on that basis[321]. In my view, ETI's argument that the permission is ambiguous in some way fatal to the Impugned Permission such that I should quash it, must fail.

179. Given the correct plans were supplied, even though incorrect plans were also supplied, and given the resolution of that issue on the basis set out above, I do not think that **Seery**[322] assists ETI. **Seery** was a case in which the supplied drawings were simply wrong. It was not a case of a conflict internal to the set of drawings, capable of interpretive resolution, as is the case here.

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315 Kelly v An Bord Pleanála & Aldi [2019] IEHC 84 (High Court, Barniville J, 8 February 2019) §196

316 Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 (McDonald J, 19 November 2020) §60 - McDonald J said: "While the Board, in its order, did not expressly adopt the entirety of the inspector's report, it is clear from the Board Direction … that the Board decided to grant permission "generally in accordance with the Inspector's recommendation". In such circumstances, the decision by the Board to grant permission must be read in conjunction with the report of the inspector." At §68 he said that the interpretation he favoured was supported by the inspector's report and that the Board decided to grant permission generally in accordance with the inspector's recommendation. That recommendation was, in turn, based on the inspector's report.

317 Day 3 p25

318 Citing Simons on Planning Law, 3rd Ed'n (Browne) §5.34 - 5–34, "A court can have regard to the context in which a planning permission was granted and will look at a permission and the documents on the planning file as a whole, including the description of the development applied for, the information provided by the developer as part of the application, and any report of an inspector. Although the wording of a grant of planning permission may be clear enough, it will very often be necessary for a court to interpret a grant of permission according to context. Where that arises, the court does not confine itself to a purely literal interpretation of a grant of planning permission or condition but will seek to ascertain its true meaning from its context in the planning process. Counsel also cited §5.28: "As noted in Tracy -v- An Bord Pleanála, the correct interpretation of a grant of planning permission is a matter of law to be determined by objective interpretation and may ultimately be decided only by the court."

319 Kirby v. Express Bus Ltd [2021] IEHC 334 (High Court (General), Allen J, 14 May 2021)

320 Interpretation of Contracts 4th Ed'n §8.13

321 Day 3 p240

322 Seery v. An Bord Pleanála & ors (Quirke J., Unreported, 26 November 2003)

180. For the foregoing reasons, and also as the true consequence of the discrepancy – a basement floor to ceiling height about 1m less than the Architect's drawings envisaged – was not pleaded, I hold that this ground of challenge is not made out. If I am wrong, I would in any event refuse relief on a discretionary basis and as disproportionate to any error shown, as ETI has not shown that either of their pleaded substantive concerns – excessive height or excessive excavation, or any planning or environmental consequences thereof – will, or even might, be realised due to the alleged error. Indeed, it is clear that neither will.

181. Accordingly, I need not address in Ground 2 the pleas in opposition that the issues now raised by ETI as to Basement FFL discrepancy had not been raised before the Board or the question of adequacy of reasons. Also, and given the view I take of the proper interpretation of the Impugned Permission, ETI's argument that Condition 1 of the Impugned Permission is incapable of fulfilment – it requires development in accordance with the plans and particulars lodged with the Planning Application – falls away.

Ground 2 – Other Allegations

182. ETI also alleged that the plans and particulars submitted failed to describe the intended works, accurately or at all, and accordingly failed to describe the likely impacts on the environment, contrary to Article 297(4) PDR 2001. As the case was argued with reference to allegedly likely impacts on the environment and Ground 3 incorporates these allegations by cross-reference, it is convenient to address these issues with Ground 3 as to AA.

Ground 3 - AA - GAPS AND LACUNAE

AA - The Law

183. **Article 6(3)** of the Habitats Directive provides that

> *"Any plan or project not directly connected with or necessary to the management of the site[323] but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and …… the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."*

184. **S.177V PDA 2000**[324] transposes Article 6(3) to Irish law by requiring, in effect[325] and as bearing on SHD, that the competent authority[326] shall give consent[327] to a proposed SHD only if it has

323 This refers to European Sites – not necessarily the development site.
324 as extended by S.27 of the 2016 Act to apply to proposed SHD under the 2016 Act
325 And subject to exceptions not here relevant.
326 Here, the Board
327 Here, SHD Planning Permission

determined under Article 6(3), either by AA screening or AA, that the proposed[328] SHD will not adversely affect the integrity of a European site.

185. A considerable body of caselaw[329], including the seminal **Waddenzee**[330], has interpreted Article 6(3) as imposing the obligation of AA[331], as applying to projects both on and outside the European Site concerned and as requiring that a "*final determination*"[332] that the project will not adversely affect the integrity of the European Site, must:

- Be formed in light of the characteristics and specific environmental conditions, qualifying interests[333], and conservation objectives of the European Site.

- Be based on identification and consideration of all aspects of the project which might[334] affect those conservation objectives.

- Be based on complete (i.e. no lacunae or gaps), precise and definitive
  - Identification of the potential risks
  - Scientific findings
    and
  - Conclusions based on the findings.

  The obligations to completely, precisely and definitively identify risks, make findings, and draw conclusions from them are distinct and separate[335] and all must be done on appropriate analysis and evaluation.

- Be based on the best up-to-date scientific knowledge[336] reasonably available[337] in the field.

- Take account of the likelihood, extent and nature of any anticipated harm[338].

- Be formed as a matter of certainty – that is to say, it must have been demonstrated that no reasonable scientific doubt remains as to the absence of such effects. The competent authority must be convinced of the absence of such effects. That test incorporates the precautionary principle[339] and is stringent[340]. But it does not require absolute certainty and the conclusion is necessarily subjective[341]. The necessary certainty is not undermined by mere assertion or negligible, purely hypothetical or theoretical risk – any uncertainty must be real. As counsel for

328 Taking account of any modifications or conditions to be imposed by the Board
329 I have footnoted only some here – as examples only.
330 Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee & Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, Judgment Of The Court (Grand Chamber) 7 September 2004
* Language
331 It also imposes the obligation of preliminary examination – screening – to establish whether in the circumstances of the case, AA is required.
332 Kelly v. An Bord Pleanála [2014] IEHC 400
333 Habitats and/or species for the protection of which the site was designated
334 By themselves or in combination with other plans or projects. The word "might" appears in Connelly v. An Bord Pleanála [2018] IESC 31.
335 Rushe & anor -v- An Bord Pleanala [2020] IEHC 122 (High Court (Judicial Review), Barniville J, 5 March 2020); An Taisce v. An Bord Pleanala [2022] IESC 8 (Supreme Court, Hogan J, 16 February 2022)
336 Dublin Cycling Campaign CLG v. An Bord Pleanala [2020] IEHC 587 (High Court (Judicial Review), McDonald J, 19 November 2020)
337 People Over Wind Environmental Action Alliance Ireland v. An Bord Pleanála [2015] IECA 272 (Court of Appeal, Hogan J, 20 November 2015)
338 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanala [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019)
339 Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 (High Court (Judicial Review), Holland J, 16 March 2022)
340 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanala [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019)
341 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanala [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019)

Cloncaragh observes, in **Sliabh Luachra**[342], counsel for the protagonists disagreed as to whether a risk expertly described as "negligible" met the "reasonable scientific doubt" standard or required refusal of planning permission on AA grounds. McDonald J, citing the precautionary principle derived from **Monsanto**[343] as cited in **Waddenzee**, confirmed the standard was stringent but absolute certainty was not required. He concluded that:

> *"As an expert body, the respondent is in a much better position than the court to form a view as to whether a risk which was described by an expert as no more than "negligible", is sufficiently remote to be discounted in the context of an Article 6(3) appropriate assessment of risk. …… the respondent was not required to be absolutely certain that a bog movement or landslide would never occur in the future. The relevant standard is reasonable doubt."*

- Be recorded and reasoned[344]. The reasonable, intelligent, informed participant[345] in the process "*must be able to understand with reasonable clarity what the Board was deciding and why*"[346]. So, the record must include:
    - the findings and conclusions - and appropriate reasons therefor.
    - the main reasons for which the Board considered those findings and conclusions to have rendered certain[347] the absence of such effects.
    - a final determination.

Pleaded Ground 3 as to AA

186. The pleaded Ground 3 asserts[348] that the Impugned Decision is invalid as the Board erred in law in determining that the Proposed Development would not adversely affect the integrity of the Lower River Shannon SAC, contrary to Article 6(3) of the Habitats Directive and S.177V(1) PDA 2000[349]. It is pleaded that there were gaps or lacunae in the AA contrary to Article 6(3) in that:

- The Board erroneously considered that if entry of groundwater could be prevented or reduced sufficiently, and if groundwater that entered could be pumped out, discharge of pollutants could be avoided. This is not the case where the water table is below the bedrock level (because cement, oil and chemical spills[350] can find their way through the bedrock into groundwater without having to first enter into groundwater within the site.)[351]

- Information was missing. This is pleaded as "*identified at Ground 2 above*".

342 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanala [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019) § 96 et seq
343 Case C-236/01 Monsanto [2003] ECR I-8166
344 Kelly v. An Bord Pleanála [2014] IEHC 400; Connelly v. An Bord Pleanála [2018] IESC 31; Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanala [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019)
345 Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála [2020] IEHC 586; Foley v. Environmental Protection Agency [2022] IEHC 470 (High Court (General), Twomey J, 26 July 2022)
346 Connelly v. An Bord Pleanála [2018] IESC 31
347 In the sense and degree described above.
348 An allegation that the Construction Management Plan impermissibly left over aspects of groundwater protection to be fully worked out was not pursued.
349 As extended to apply to proposed development under the 2016 Act by virtue of Section 27 of the 2016 Act
350 The plea as to oil and chemical spills was abandoned at trial – Day2 p51
351 An assertion that in so doing the Board failed to have regard to relevant information, namely published research by the Geological Survey of Ireland relating to the nature of karstified bedrock, was not pursued

Pleaded Opposition to Ground 3 as to AA

187. Generally, Ground 3 is traversed[352] and its reliance on lacunae pleaded in Ground 2 is based on pleas in Ground 2 which are likewise traversed. Objection is also taken to reliance on evidence and submissions on the merits not put to the Board. It is pleaded that the Board's conclusions in AA were open to it on the evidence before it, and that the Applicant has failed to demonstrate that a reasonable expert, that had the relevant and sufficient expertise and was aware of, and in a position to fully understand and properly evaluate, all the material before the Board, could have a reasonable scientific doubt as to whether there could be an effect on a European site, arising from the effects of the proposed development on groundwater or otherwise.

Ground 2 incorporated in Ground 3 - Plans and Particulars

188. As recorded above, Ground 2 alleges failure by Cloncaragh to submit requisite plans and particulars. This relates in the first instance to the Basement FFL discrepancy, with which I have already dealt. Its putative present relevance would appear to relate to the plea, which I have rejected above, that the building will be "*1m deeper than the engineers propose, altering its impacts on groundwater*." However, ETI also pleads, and all parties agree, that "*the depth of excavations and all environmental calculations in relation to potential impact on groundwater are based on"* the engineer's stipulation of the higher Basement FFL of 11m OD. And I have found that that the permitted Basement FFL is 11m OD. So, the "*environmental calculations in relation to potential impact on groundwater*" are based on the permitted Basement FFL and not on a lower FFL than that permitted. There is no discrepancy in this regard.

189. Other allegations in Ground 2 of missing information, incorporated by reference in Ground 3, omitting elements abandoned, include pleas[353] of failure by Cloncaragh to identify,

- 1.[354] Adequately[355], the need to excavate bedrock in the northern portion of the site to lay a floor slab at the proposed level.
- 2. Adequately[356], the need to lay a poured concrete floor which would be at or near groundwater level in the southern portion of the site.
- 3. Adequately[357], the nature of the bedrock, on which the piles for the building would stand or the depth at which such piles would be constructed.[358]
- 4 Adequately or at all, the need to drill into the bedrock to a depth greater than 4m in order to insert steel reinforcement bar for the construction of secant piles.

352 i.e. denied
353 Grounds §2.2 as refined at trial
354 As pleaded, merely bullet points were used. At hearing numbers were assigned for ease of reference.
355 Counsel for ETI accepted that he could not allege failure by Cloncaragh to identify this issue "at all" – Day 2 p43 & 52
356 Counsel for ETI accepted that he could not allege failure by Cloncaragh to identify this issue "at all" – Day 2 p44 & 52
357 Counsel for ETI accepted that he could not allege failure by Cloncaragh to identify this issue "at all" – Day 2 p44 & 52
358 Counsel for ETI abandoned as unnecessary a plea of failure to identify "the nature of the bedrock, a karstified limestone, or to explain that such a rock is by its nature porous and fractured, and can readily provide a route for cement, oil and chemicals to enter groundwater and cause contamination, even or especially when groundwater levels are lower" – D2 p56. This was explicitly on the basis that the Board and Cloncaragh had admitted that there was a hydrological route to the European Sites and their real defence on the cement leaching issue was that the risk of leaching was non-existent.

- 5. Adequately or at all, the cement[359] pollution risks associated with the need to drill into the bedrock to a depth greater than 4m to insert steel reinforcement bar for the construction of secant piles.

- 6. Adequately or at all, the construction methodology or the need to pour concrete to create secant piles around the site to a depth of 4m or more below floor level, below bedrock level, and below the groundwater table.

- 7. That the excavation of and drilling into the bedrock could fracture or exacerbate the fractures of the bedrock, providing a route through which spilled cement[360] could enter the aquifer.

ETI also plead that Cloncaragh

- 9.[361] Wrongly stated that rock formation levels are expected to be 2m-3m below basement level of 11m AOD[362] when the inferred bedrock level from the Borehole Report[363] was in parts higher than 11m AOD (when compared with the contour levels on the engineering map, Drawing 18104-2A-1.)

In my view, the foregoing allegations are not made out.

190. I accept the Board's submission that need to excavate bedrock in the northern portion of the site was clear from the Groundwater Management Plan. It describes the north-western corner as exceptional in that *"the limestone bedrock was encountered at a much shallower depth. In this location groundwater was recorded to sit within the limestone bedrock at an average elevation of 11.7mOD.*" Given the Basement FFL is to be 11m OD and hence an excavation down to 10m OD is required, it necessarily follows that excavation will be into bedrock and below the groundwater level – hence the identification of a wet excavation requiring groundwater management measures in this area. These aspects are clearly to be seen in the Groundwater Management Plan Figure 4-1: Sketch Geological Cross Section. Further, §4.2.2 of that plan clearly addresses the resultant groundwater management measures required in this area. Further again, whereas ETI criticises the Groundwater Management Plan for describing groundwater in this area as at an average of 11.7m OD[364], whereas it was found at up to 12.56m OD, the very source of that information is the following page of the Groundwater Management Plan itself[365] and was thus apparent to, and no doubt understood by, the Inspector and the Board. I also accept that the application documents adequately describe the groundwater levels as discerned. The excavation levels at 10m OD, as variable to greater depths for sumps and the like, are also described. And in any event, whether groundwater is at 11.7m OD[366] or 12.56m OD, as the excavation will be to at least 10m OD, the result is the same – a wet excavation needing pumping out. I cannot conclude that ETI has shown this aspect of the application inadequate.

191. It is convenient here to also address a suggestion by ETI that the planning application documents failed to address the fact of higher groundwater level in the north-western corner of the

359 In this respect, the plea as to oil and chemical contaminants was abandoned at trial – Day2 p51
360 In this respect the plea as to oil and chemical contaminants was abandoned at trial – Day2 p51
361 #8 was abandoned
362 Construction-Management-Plan §2.12
363 annexed to the Construction-Management-Plan
364 Groundwater Management Plan §3.2
365 Table 3-2: On-Site Groundwater Levels
366 Groundwater Management Plan §3.2

site as likely to result in a "wet" excavation. I reject that suggestion. Various drawings[367] and borehole results illustrate the higher groundwater level in the that corner. Indeed, that higher level provided the upper point of the groundwater gradient considered relevant by Cloncaragh to groundwater flow direction and much-criticised by ETI. The Inspector was clearly aware of the position asserted by Cloncaragh in this regard. The Inspector's report explicitly records that the Groundwater Management Plan envisages a Basement FFL of 11m OD such that it *"is estimated that basement excavation formation level will approximately be 10mOD. This indicates a likely positive groundwater head of up to +2m in the north-western corner of the site above the base of the excavation with the majority of the basement exaction[368] above the average groundwater level suggesting a dry excavation."*

192. As a fact, the pouring of concrete foundations, floors, and secant piles is described in the Application documents - as are the formation levels at which they will be poured, as are the groundwater levels. It does not take an expert to say that the pouring of such foundations, floors and piles in such a development as this is not at all unusual and I see no reason to consider that the description was inadequately understood by the expert Board. Nor do I consider that the relatively simple concept and general method of specifically secant piling would have been mysterious to the expert Board – or to any reasonably intelligent, interested, observer who chose to inform himself/ herself in that regard. Indeed, counsel for ETI agreed – and agreed also that Ms Hayes understood the concept without engineering help[369]. There is no reason to infer that the Board failed to adequately understand these concepts in this case. Indeed, so commonplace must pouring of concrete foundations and piles be that, even as a layman in this respect, one can express surprise that any supposed resultant risk to groundwater by cement leaching from poured concrete is not almost equally commonplace and well-understood.

193. The allegation of failure to identify, adequately or at all, the need to drill into the bedrock to a depth greater than 4m in order to insert steel reinforcement bar for the construction of secant piles was all but withdrawn at hearing[370]. In my view that was wise given, not least, the relevant Construction Management Plan drawing[371], which clearly shows the piles driven to an average of 4m below rock level. The Groundwater Management Plan refers to them being at depths greater than 5m but that presumably refers to depth below existing ground level.

194. I also accept that, whatever Dr Drew's criticisms of the geological investigation, there is no dispute that matters as to the nature of the bedrock – which all agree is weathered/fractured limestone, whether karstified or not - or that the piles will sit in that bedrock.

195. The allegation that Cloncaragh wrongly stated that rock formation levels are expected to be 2m-3m below basement level of 11m AOD[372] when the inferred bedrock level from the Borehole Report[373] was in parts higher than 11m AOD (when compared with the contour levels on the engineering map, Drawing 18104-2A-1.), seems to me to proceed from a misunderstanding of the relevant content of the Construction Management Plan and confusion as to the relationship

367 E.g. Groundwater Management Plan Figure 4-1: Sketch Geological Cross Section.
368 Sic. This clearly should read "excavation".
369 Day 2 p66
370 Day 2 p44 etc. Day 3 p69
371 P13
372 Construction-Management-Plan §2.12
373 Annexed to the Construction-Management-Plan.

between rock formation levels and bedrock levels. Bedrock levels pre-exist the works. Formation levels are determined by the works. §2.12 of the Construction Management Plan is headed and addresses the issue of "*Foundation Construction*". It states that completion of the basement excavation will precede the commencement of the foundations. Of the foundations, it says that "*Rock formation levels are expected to be 2m – 3m below basement level. The Basement finished floor level is 11m above ordnance datum, (AOD). The simplest form of foundation construction will consist of pad foundations founded on this underlying rock."* What is intended is then illustrated by a simple and clear drawing[374]. If, as is clear especially in the north-western corner of the site, bedrock level is above 11m OD, then excavation down to the basement formation level and, in turn to the foundation level will ensue. I do not see any lack of clarity in the relevant content of the Construction Management Plan or contradiction between it and other elements of the Planning Application. As counsel for the Board observed[375], ETI never developed this argument in writing or orally and for the reasons just stated, I reject it.

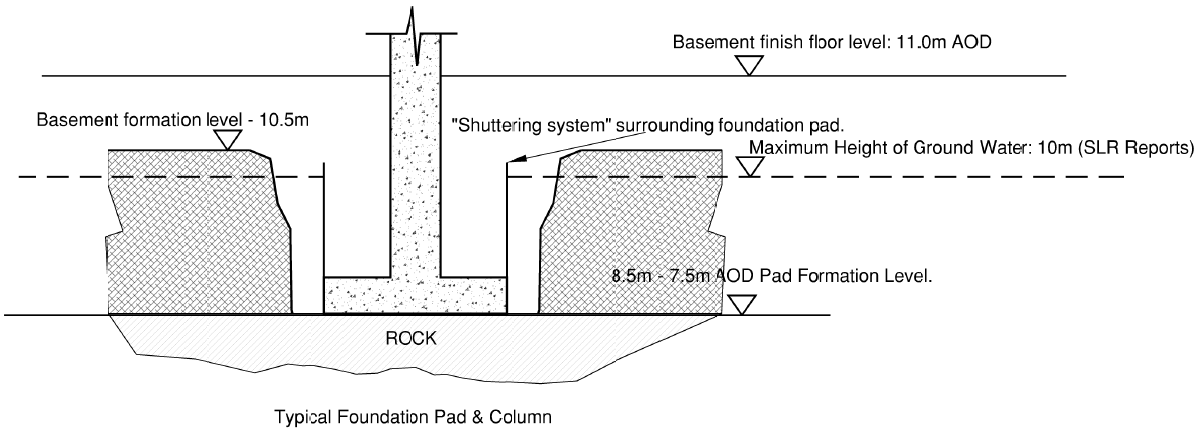

Figure 3 – Construction Management Plan - Typical Foundation Pad & Column

196. Mr Duffy supports the plea that that the excavation of and drilling into the bedrock could fracture or exacerbate the fractures of the bedrock, providing a route through which spilled cement[376] could enter the aquifer. The experts for Cloncaragh denied any such possibility and were not cross-examined. I will deal specifically with the issue of cement in due course, but that the limestone was fractured and could provide a route for pollutants to enter the groundwater was assumed in the Planning Application and by all sides in this judicial review.

197. ETI also pleads that Cloncaragh submitted plans which, contrary to Article 298(1)(a) PDR 2001[377], failed to show significant features on, adjoining or in the vicinity of the Site - specifically the location of the karstified bedrock and the groundwater level relative to the basement floor, the building piles, the secant piles, and the contaminated ground.[378] I reject these pleas as to fact. All these features were depicted in the Planning Application papers. That the bedrock was described not as karst but as fractured, even if an error, does not merit certiorari.

374 Figure 3 below.
375 Day 3 p83 & 84
376 In this respect the plea as to oil and chemical contaminants was abandoned at trial – Day2 p51
377 The words "contrary to" do not appear in the Grounds. This is clearly a typo and the words are to be inferred.
378 Grounds §2.3

198. A plea that the wrongly Construction Management Plan leaves over aspects of groundwater protection to be fully worked out was abandoned.[379]

Secant Pile Depth and No Secant Pile Elevations - Breach of Article 297 PDR 2001

199. Technically the issue of elevations is a Ground 2, not a Ground 3, point but it is convenient to address it here. The assertion of a failure to identify the need to drill into the bedrock to "a depth" in order to insert steel reinforcement bar for the construction of secant piles clearly fails on given the relevant Construction Management Plan drawing[380]. As to the measured depth at which the secant piles would be constructed, that drawing clearly identified an average depth of 4 metres below rock level and somewhat more below ground level.

200. At trial, I expressed concern that a meaningful understanding of an average requires an understanding of the range of values of which it is made up but, on reflection, that was a somewhat purist mathematical approach, as opposed to an analysis of what the Planning Application conveys to the reasonable intelligent reader and to the Board. On reflection, it seems to me easy to see why an average would be stated in an environment in which rock levels and ground conditions unsurprisingly may vary across the Site. Notably, neither of the two engineers who swore affidavits for ETI, Mr Duffy and Mr Moynihan, complained of inability to adequately understand what was intended as to secant pile depth and it is perfectly clear that excavations[381] for the secant piles will be to a level below both existing bedrock level and existing groundwater level. Once that is clear, and as to the alleged risk of pollution of groundwater via those excavations and/or by cement leakage, there is no evidence or even suggestion that the precise depth of excavation has any appreciable relevance.

201. ETI made a particular argument, relying on **Balscadden**[382] and Article 297 PDR 2001, that the plans and particulars of the planning application were inadequate for want of elevation drawings of the secant piles. Article 297(4)(a) PDR 2001 requires that a planning application *"shall be accompanied by such plans (including a site or layout plan and drawings of existing and proposed floor plans, elevations and sections which comply with the requirements of article 298) and such other particulars as are necessary to describe the works to which the application relates …."*. While Article 297 relates to SHD planning permission applications, the obligation mirrors the obligations as to plans and particulars in planning and similar applications generally[383].

202. The essential requirement here is to provide "*such plans .... and such other particulars as are necessary to describe the works".* In my view, the words in brackets - *site or layout plan and drawings of existing and proposed floor plans, elevations and sections* – do not require that every conceivable elevation must be supplied – any more than all of the infinite possible number of sections must be supplied. The words "such" and "necessary" in the Article are important. And the word "describe" is ambiguous as admitting of degrees of description.

379 Day2 p58
380 P13
381 Incidentally, I agree with ETI that I should reject as pedantic and insubstantial, Cloncaragh's criticism of the use of the word "excavation" as to the secant piles when what is intended is drilling. Drilling is a method of excavation.
382 Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála [2020] IEHC 586 (High Court (Judicial Review), Humphreys J, 25 November 2020)
383 See Art 22(4), Art 83(1), Art 227 & Art 267(2) PDR 2001

203. Clearly, this Article must be read purposively as imposing a functional requirement. What is required are such plans and particulars as, in combination, are necessary to describe the works. More than is necessary is not required. Necessity is judged by reference to adequacy in enabling the public, consultees, and the decisionmaker to adequately understand what is intended so as to enable them to perform their respective functions in the planning process. The substance of that requirement for plans and particulars will inevitably vary considerably, depending on the degree of complexity of the proposed development and the planning and environmental considerations arising along a spectrum from, for example, some simple domestic dwellings in urban areas to, for example, a large and complex Seveso installation on the edge of a European Site[384]. And there may be more than one possible combination of plans and particulars which will suffice. It is the sufficiency of the conspectus of those plans and particulars which matters.

204. No doubt **Balscadden**[385], which ETI cites for certiorari of a permission in which no elevations of subterranean sheet piles had been provided, was decided on its facts and having regard to the particular development intended. I do not doubt that case was correctly decided. It is mandatory, at risk of invalidity of the planning application, to provide such plans and particulars as, in combination, are necessary to describe the works. But that observation does not answer the question what are the plans and particulars necessary to describe the particular works, for which a particular permission is sought?

205. The outcome in **Balscadden** is unsurprising. The sheet piles in question were to stabilise a high slope at the top of which sat the objectors' homes. No planning drawings had been submitted of those sheet piles.

206. That is not so here. Here, the location of the secant piles wall is illustrated in plan, inter alia, on the Bulk Excavation drawing[386] and detail is illustrated in plan[387] and in section (the latter including average depth below rock level and groundwater level) in the Construction Management Plan[388]. ETI has not demonstrated that elevations would have added anything necessary (in the sense described above) or that, to use a phrase used in **Balscadden**, there has been a failure to describe in the planning application the "principal dimensions" of the proposed development. Nor did anyone complain of such deficiency to the Board. Nor did Ms Hayes in her grounding affidavit. Nor did the two engineers who swore affidavits for ETI, Mr Duffy and Mr Moynihan, complain of a lack of elevation drawings of the secant piles. I therefore reject this argument.

207. ETI also pleads[389] that, if and insofar as the Board may have considered the matters identified above, its reasons are insufficient to disclose its reasoning such that the Board has failed to state the main reasons and considerations on which its decision is based, or its reasoned conclusion as to the significant effects on the environment of the proposed development on which the decision is based, thus leaving them in breach of S.10(3) of the 2016 Act. ETI made the same plea in Ground 2, but there pleaded specifically that:

384 This comparison is made at a high level of generality. Of course, depending on circumstances, in a planning application for a domestic dwelling in an urban area, many and very detailed plans and particulars may be needed.
385 Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála [2020] IEHC 586 (High Court (Judicial Review), Humphreys J, 25 November 2020)
386 McGann Drawing 18.104.10. Also McGann Drawing 18.104.2.
387 See footnote above
388 P13
389 Grounds §3.2

"The Board has not explained how it took account of the nature of the bedrock and the potential for leaks through it when it decided that mitigation measures which depended on restricting the flow of groundwater into the site would prevent pollution."

However, on a fair view of the cross-referencing of Grounds 2 and 3, I consider that these particulars should also be considered to have been given in Ground 3.

Pleadings - Hydrological Route & Failure to Properly Establish Groundwater Levels.

208. The risk to groundwater by contamination at and from the Site is pleaded. The existence of a hydrological link to the SAC is not pleaded but is implied in the Grounds and is explicit in the grounding affidavit sworn 11 October 2021. But there is no plea in the Grounds and no allegation in that affidavit as to an issue on which ETI had pressed the Board in its submission and pressed also at trial: that Cloncaragh had failed to reliably identify the specific hydrogeological route whereby contaminants in groundwater might reach the European sites and had ignored shorter possible routes – including some which had been identified in the URS Report – in identifying only the route from the Site southeast to the Dooradoyle River.

209. The issue here is the direction of groundwater flow. That issue first came into the case only after the Opposition papers had been filed – in Dr Drew's affidavit of 15 February 2022 and his report exhibited thereto filed some months after leave had been granted. Only from that point was an allegation made in the case that, in assessing only a route running in groundwater southeast from the Site over 500m to discharge to the Dooradoyle River and from there 2.3km in that river to the European Sites, Cloncaragh ignored the risk of other possible, shorter, groundwater route directions away from the Site, anywhere in an arc from Southeast, via West to North. So, that issue was not in the case for which leave to seek judicial review was granted and no amendment of the Grounds was later made.

210. The Board and Cloncaragh, unsurprisingly, say the Applicant should be confined to its pleadings and so cannot make this case. I agree.

211. **Order 84, Rule 20(3)** of the Rules of the Superior Courts requires that an applicant for judicial review state precisely each ground of challenge, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground. Order 84, rule 23(1) provides that no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement of grounds.

212. The pleadings rules in judicial review are strict – for example, see **Martin**[390], **St Audoen's**[391], **People Over Wind**[392], **AP**[393], **Clifford**[394] and **Rushe**[395]. Pleadings are "*absolutely vital*" [396] in judicial

390 Martin v. An Bord Pleanala [2022] IEHC 256 (High Court (Judicial Review), Ferriter J, 27 April 2022) §19
391 The Board of Management of St. Audoen's National School v. An Bord Pleanala [2021] IEHC 453 (High Court (Judicial Review), Simons J, 15 July 2021)
392 People Over Wind v. An Bord Pleanála (No. 1) [2015] IEHC 271, the High Court (Haughton J.)
393 AP v. Director of Public Prosecutions [2011] 1 I.R. 729
394 Clifford & Sweetman v An Bord Pleanála & Ors [2021] IEHC 459 §59
395 Rushe & anor -v- An Bord Pleanala [2020] IEHC 122 (High Court (Judicial Review), Barniville J, 5 March 2020)
396 Clifford & Sweetman v An Bord Pleanála & Ors [2021] IEHC 459 §59

review and it is "*essential*" [397] that an applicant for judicial review sets out "*clearly and precisely each and every*" [398] relief sought and the ground upon it is sought. There is an "*absolute necessity for a precise defining of the grounds*" [399] – and it is clear that these are to be set out in the Grounds themselves and not in such as a replying affidavit[400]. Haughton J has described[401] the rules as "*stringent*" and as allowing "*little room for manoeuvre*" - for either applicants or the court - after leave to seek judicial review has been granted. As McDonald J said in **Perrigo**[402]: *"The statement of grounds is a crucial document in judicial review proceedings. It defines the scope of the claim made and fixes the parameters of the review to be carried out by the court of the legality of the decision under challenge."*

213. Baker J in the Supreme Court recently, in **Casey**[403] - a judicial review matter - held that:

- The pleadings set the parameters and fix the issues in dispute between the parties and those to be determined by the court. They define the issues and confine the evidence of the trial to the matters relevant to those issues.
- The pleadings also define and limit the jurisdiction of a court - they set the parameters for the jurisdiction of a court, more precisely, the jurisdiction to decide the issues so identified.
- For this purpose a statement of grounds in judicial review is to be considered a pleading.
- The way a claim is pleaded is a factor of some importance in judicial review - citing O. 84 r. 23(1) RSC and citing **Keegan**[404] to the effect that the definition of issues by pleadings and limiting the evidence only to those issues *"is particularly important in judicial review, which is a powerful weapon of review of administrative action".*
- Having regard to the requirement to obtain leave to bring judicial review on the grounds pleaded, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined at trial could be regarded as stricter than in other types of proceeding.
- None of the decided cases suggest that a judge in judicial review is entitled to determine a point for which leave was not granted, which was not pleaded, where no application was made to amend pleadings, and where no consideration was given before the point was argued as to whether the time limits in judicial review, or other gateway requirements might be a bar to relief.

214. In **Rushe**[405]**,** Barniville J reviewed the caselaw and made clear that:

- *"the order giving leave to seek the various reliefs on the grounds set out in the statement of grounds is what determines the jurisdiction of the court to conduct the review."*[406]
- The pleading rules apply "*with even greater force in … a planning judicial review having regard to … s. 50A(5) of the 2000 Act"* which *"provides that if a court grants leave to apply for judicial review in respect of a planning decision, "no grounds shall be relied upon in the application for judicial review" under O. 84 RSC "other than those determined by the court to be substantial" under s. 50A(3)(a), on the application for leave.".*
- The pleading rules "*are particularly important*" in judicial review of such as AA issues as such *"cases involve issues of very considerable complexity and give rise to issues under EU*

397 AP v. Director of Public Prosecutions [2011] 1 I.R. 729 – Murray CJ §5
398 AP v. Director of Public Prosecutions [2011] 1 I.R. 729 – Murray CJ §5
399 AP v. Director of Public Prosecutions [2011] 1 I.R. 729 – Hardiman J §43
400 AP v. Director of Public Prosecutions [2011] 1 I.R. 729 – Hardiman J §43
401 People Over Wind v. An Bord Pleanála (No. 1) [2015] IEHC 271, the High Court (Haughton J.)
402 Perrigo Pharma International DAC v. McNamara [2020] IEHC 552 (High Court (Judicial Review), McDonald J, 4 November 2020)
403 Casey v. Minister for Housing [2021] IESC 42 (Supreme Court, Baker J, 16 July 2021)
404 Keegan v. Garda Síochána Ombudsman Commission [2015] IESC 68
405 Rushe & anor -v- An Bord Pleanala [2020] IEHC 122 (High Court (Judicial Review), Barniville J, 5 March 2020)
406 §108

Directives, such as the Habitats Directive and the EIA Directive. It is especially important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded .."

215. In **Reid #1**[407] Humphreys J summarised the basic rule as regards pleadings as follows:

- a party can only pursue grounds set out in his or her pleadings;
- a party cannot introduce new grounds of claim or opposition by affidavit;
- any new grounds or reliefs have to be sought by amendment of the statement of grounds and likewise for any new points of opposition.

216. Of course, a case coming within a "*fair and reasonable reading*" of the pleadings should not be excluded - **St Audoen's**[408]. But I do not see that such a reading avails ETI here to allow it to run a case, based on inadequate identification of the hydrological route and/or ignoring other possible such routes, which simply wasn't pleaded, even though the point had been expressly made in ETI's submission to the Board.

217. Twomey J in **Foley**[409] has reemphasised and explained the importance of pleadings in judicial review. Though the argument was not made in this case, it is notable that Twomey J gave reasons for rejecting an argument that he should have decided unpleaded arguments against the possibility that the Court of Appeal might find that they had been pleaded. There is no entirely satisfactory solution, as to decide an unpleaded issue is unsatisfactory for many reasons and not to decide it creates the possibility of the necessity of remittal of the matter to retrial by the High Court if the Court of Appeal disagrees that the issue was not pleaded. In my view, there is no need for a bright-line rule on this issue, nor do I read Twomey J as laying one down. Decisions can be made on the facts and circumstances of particular cases. However, some general observations can be made.

218. Such issues turn in considerable part on practical considerations of deployment of court resources and on the carrying into effect of the principles of importance of pleadings in judicial review emphasised in the caselaw cited above. Most High Court decisions in judicial review are not appealed and a smaller proportion still are appealed on the basis of an alleged error by the High Court on a pleading point. These considerations are considerably amplified in planning and environmental judicial review - in which leave to appeal on a pleading point is not typically granted given the criteria for granting such leave. And experience suggests, very generally, that most appeals fail. So, in general terms, the necessity of remittal to retrial by the High Court if the Court of Appeal disagrees that an issue was not pleaded is likely, in practice, to be comparatively rare. By contrast, the disruptive effect on trials in judicial review in the High Court of unpleaded arguments being made and the extension of the duration of such trials in consequence, would be far from uncommon and would undoubtedly in practice, and for reasons identified by Twomey J, be greatly exacerbated by a rule requiring High Court judges to decide points not pleaded. On an overview of court resources, it seems to me that the ills of such a rule would, in practice, far exceed those of the occasional remittal of a case to the High Court in which it was found to have erred in excluding a point as not pleaded. It seems to me that, at least in general and as a default position, High Court

407 Reid v. An Bord Pleanala [2021] IEHC 230 (High Court (Judicial Review), Humphreys J, 12 April 2021)
408 The Board of Management of St. Audoen's National School v An Bord Pleanala [2021] IEHC 453 (High Court (Judicial Review), Simons J, 15 July 2021)
409 Foley v. Environmental Protection Agency [2022] IEHC 470 (High Court (General), Twomey J, 26 July 2022)

judges should not be required to decide points not pleaded. I see no reason to do otherwise in this case.

219. I should emphasise that I exclude this issue of inadequate identification of the hydrological route only as it was not pleaded. I do not do so on any basis that, in this regard, Dr Drew's evidence is inadmissible as "ex post facto" the Board's decision or as "gaslighting" the Board by introducing new material which had not been before it. I need not decide that issue and it may be arguable that, had that case been pleaded, Dr Drew's evidence would have been admissible as based on materials which were before the Board (perhaps notably the URS Report as to groundwater flow direction and the Board's identification in its earlier refusal of the necessity of a *"full understanding and analysis of the hydrological connectivity"*). It may be arguable that, had that case been pleaded, Dr Drew's evidence would have been admissible as introducing no new factual evidence, as relating to an issue which the ETI Submission had argued, and as confined to the expression of his opinion on that issue and those materials. It arguably might also be admissible as relating to the autonomous duty of the Board, identified in **Madden**[410] and in **Reid #2**[411] to itself bring the necessary level of expertise to bear on the assessment of the developer's material for the purposes of the Habitats Directive, as coming within what has been called the "Homework Principle" and/or as within the possibility identified in **Flannery**[412] of drawing attention to matters that it is contended should have been evident to the Board on the face of the material before it. As I need not decide that aspect of the issue of admissibility of Dr Drew's evidence, I do not. Dr Drew's evidence is inadmissible as to the issue of identification of the hydrological route/groundwater flow direction only for the simpler reason that that issue was not pleaded.

220. While it would be a matter for the judge in any subsequent judicial review - and I make no pretence to a decision, much less to advise, on the question - I would make some observations on this point. As the question of hydrological directional flow other than to the south-east was raised in the ETI Submission, the Council in any new report to the Board, and the Board in making any decision in AA on foot of any remittal to it of the Impugned Permission (and more generally any interested parties) should carefully consider whether and to what, if any, effect this finding on the pleadings in this judicial review may or may not apply in any subsequent judicial review in which an issue of non-consideration of hydrological directional flow other than to the south-east was pleaded.

221. At trial, ETI also complained of failure to properly establish the groundwater level under the Site. ETI were not so much concerned if the groundwater level is high. If so, they said groundwater will enter the Site and, whether or not contaminated, will be pumped out and treated. ETI was more concerned that if the groundwater level is low[413] and the site excavation is dry, anything spilled during construction will enter the soil and bedrock beneath, and percolate down into the groundwater – at risk of its thence travelling to the Lower River Shannon SAC. The allegation of failure to properly establish the groundwater level is found in the Drew Affidavit and Report but Dr Drew disavows assessing any questions of contamination resulting.

222. The Grounds, which preceded the Drew Affidavit and Report by some months, refer to groundwater levels in various respects, and do complain of failure to depict groundwater levels. I reject that complaint. Groundwater levels are repeatedly depicted in drawings and described in

410 Madden v An Bord Pleanála [2022] IEHC 257 (High Court (Judicial Review), Ferriter J, 4 May 2022)
411 Reid v An Bord Pleanála & Intel #1 [2021] IEHC 362 §40 et seq
412 Flannery v An Bord Pleanála, Tempelogue Synge Street GAA Club & Ors [2022] IEHC 83
413 Day2 p130

borehole results and tables thereof. But the Grounds do not complain of failure to properly establish those groundwater levels – that the groundwater levels depicted are inaccurate. That case is not pleaded and so cannot be entertained. That of itself does not prevent argument that pollutant spills on a dry excavation could pose a threat to the SAC. It merely prevents argument, in effect, whether particular parts of the excavation will be dry or wet and, in any event, there was in reality little dispute on that issue in general terms. However, the reality of such a risk depends on the reality of risk of pollutant spills – which, as the case was run by ETI, in effect means concrete spills and the posited risk of cement leaching therefrom. Indeed, as concrete will be poured on most, if not all, the excavated surfaces, the concept of a "spill" is not quite accurate but nothing turns on that. I will come to the reality of that risk in due course.

Consequences of the Pleading Issue as to Hydrological Route

223. It appears to me to follow from the foregoing that the case as to AA must be considered on the basis of the hydrological route to the European Sites identified by Cloncaragh/SLR in the Planning Application, including the NIS, and as considered by the Board for AA purposes. That is to say, the case as to AA must be considered on the basis that groundwater flow direction to the South East 500m to the Dooradoyle River and thence in that river 2.3km to the nearest European Site was correctly identified in the Planning Application.

224. Importantly, the Board and Cloncaragh do not dispute and did not dispute in the AA process that, as to any escape of pollutant from the Site, that hydrological route exists. It seems to me that, given that concession, nothing turns on the precise geology, scope of works or depth of excavation and whether, for example, the bedrock is fractured or is karstified.

Disputed Risk of Cement Leaching to Groundwater

225. As the case was pleaded and as the evidence was adduced, and as the case ran on the question of risk to the SAC, ETI concentrated entirely on the pleaded allegation of failure to identify and consider risk posed by pollutant cement leaching to groundwater and thence travelling, via hydrological link, to the SAC[414]. As counsel for ETI put it; *"There's a plan for the oil contamination in the soil, but there's no consideration of the potential impact of the wet concrete, …. that's the significant problem that we have identified."* No objector raised before the Board that issue of cement leaching. Specifically, ETI did not.

226. ETI plead, and ETI's expert, Mr Duffy, opines, that there is a significant risk of cement leaching to groundwater from poured concrete[415] – whether poured as floor slab, pad foundations, or into tremie pipes to create secant piles. They say that such risk was not addressed in the Planning Application, NIS or AA, such that there remains reasonable scientific doubt that, by such cement leaching, there may be adverse effect on the integrity of the SAC. Cloncaragh's experts, Mr McGann and Mr Paul, and the Board agree that risk was not addressed, but say that is because there simply is no such risk – Mr Paul described it as a "*non-issue*". They also point out that this supposed risk was

414 Day 1 p35. Also Day 2 p46 & 51 and Day 3 p199 & 110 & 213

415 I reject Cloncaragh's criticism that ETI failed to distinguish concrete from cement – ETI's allegation was adequately clear.

not raised before the Board. The respective experts are in bald dispute on the very existence of any such posited risk. None have been cross-examined.

Can ETI Raise Cement Leaching and is the Duffy Evidence on it Admissible?

227. The question whether an applicant in judicial review of AA can raise an issue not raised before the Board and adduce on that issue evidence which was not before the Board is fraught and the answers can be subtle. First, it seems to me useful, in considering the authorities, to recognise that similar issues can arise in subtle but different ways. They may arise in the form of:

- issues pleaded which were not raised before the Board
- new factual evidence which was not before the Board as to
  - issues pleaded which were not raised before the Board
  - issues pleaded which were raised before the Board
- new opinion evidence which was not before the Board as to
  - issues pleaded which were not raised before the Board but as to which the relevant facts were before the Board
  - issues pleaded which were not raised before the Board but as to which relevant facts were not before the Board
  - issues pleaded which were raised before the Board

The foregoing is not a complete list of permutations, but it suffices to at least illustrate the point. It must also be acknowledged that, in expert evidence, the line between opinion and fact is not always bright.

228. However, it seems to me that, in circumstances in which the intention to pour concrete floor slabs, pad foundations and secant piles on fractured limestone containing groundwater was patent on the planning application, the essential relevant facts were before the Board so that Mr Duffy's expert evidence is, in essence, an opinion that, on the facts before the Board, it ought, in AA, to have seen and addressed a risk of cement leaching. So, of the variations set out above, this is a case of new opinion evidence which was not before the Board as to an issue pleaded but which was not raised before the Board and as to which the relevant facts were before the Board.

229. It is a fundamental domestic law principle that the legislature, for good reason, has assigned the task of making planning and associated decisions, in this case AA, to experts, in this case the Board, and not to the Courts who are not experts. That good reason is especially good where the decisions in question require "*complex scientific or technical assessments and weighing up*"[416]. In general terms at least, EU law recognises that principle also. Though whether the resultant curial deference is of a lesser order and the standard of judicial review stricter in AA than traditional O'Keeffe review for irrationality remains controversial – see the opinion of AG Kokott in **Lies Craeynest**[417], and the judgments of Humphreys J in **Reid #2**[418] and Ferriter J in **Madden**[419]. Interestingly, AG Kokott's view in **Lies Craeynest** appears at odds with the view taken in **Carroll**[420] that *"that planning and fundamental rights are at different ends of a spectrum in terms of gravity of outcomes for persons affected by decisions, and, consequently, the deference accorded to the decision-maker is greater in planning cases".* At least where the planning considerations involved are

416 Lies Craeynest – see infra
417 Case C-723/17; Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Others – Opinion of AG Kokott, 28 February 2019
418 Reid v. An Bord Pleanála & Intel [2021] IEHC 362
419 Madden v. An Bord Pleanála [2022] IEHC 257 (High Court (Judicial Review), Ferriter J, 4 May 2022)
420 Carroll v An Bord Pleanála [2016] IEHC 90

environmental in nature and given the "*high level of environmental protection*" required by Article 3(3) TEU, Article 37 CFREU and Article 191(2) TFEU AG Kokott appeared to regard them as akin to fundamental rights. And given the great overlap between planning and environmental considerations, if indeed there is much practicality left in any such distinction, one wonders if differential degrees of curial deference are practical? Whether **O'Keeffe** was the correct standard of review was canvassed by the parties in submissions. However, for reasons which will become apparent, I need not decide that issue.

230. Nonetheless, it remains the case that judicial review is only of the legality of AA determinations (more accurately, the legality of the planning decisions which ensue) and is not an appeal on the merits. In **Dublin Cycling**[421] McDonald J, as to AA Screening by the Board as competent authority, said *"…. these judicial review proceedings are in no sense an appeal from the decision of the Board on that issue. In contrast to the court, the Board is a body with significant expertise and experience of carrying out such assessments."*

231. Flowing from the principle that the assigned decision-makers, not the courts, should make the decisions assigned to them, and by and large, administrative decisions – especially by expert bodies - are expected to finally dispose of the matters to which they relate. It is expected and presumed that administrative decision-makers will act in accordance with law, independently and impartially. Indeed, in judicial review it is presumed that they have done so. It is expected that where decision-makers act in accordance with law, independently and impartially, those affected by such decisions will ordinarily accept them, even if disappointed. While, in general terms, the availability of judicial review to challenge administrative decision proceedings is very important, useful and necessary, as the legality of decisions is essential to their acceptance by those affected and to public confidence in such decisions, judicial review should nonetheless be the exception not the rule.

232. As judges see only the pathology of life and given the size of the judicial review lists, we may form the impression – if subconsciously - that almost all or the majority of administrative decisions are challenged in judicial review. No doubt the opposite is in fact the case, and the vast majority of decisions are accepted for reasons including general public confidence in administrative decision-making processes. If, in a particular area of decision-making, a large number or proportion of decisions is not accepted, that may reflect the general acuity of the effect of administrative decisions of a particular kind on the persons affected, a general lack in the quality of decision-making in that area, a lack of public confidence in such decision-making, or a combination of such factors. Donaldson MR in **Huddleston**[422] described what one might call the "project" of judicial review as a *"relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration"*. A view endorsed by Cooke J in **Saleem**[423] and Barrett J in **Murtagh**[424]. (For the avoidance of doubt my purpose here is to identify the general nature of that relationship and common aim – not to suggest that the issues of candour canvassed in those cases arise here.)

233. Also flowing from that principle that decisions should be made by the assigned decision-makers, not the courts, participants in administrative decision-making processes must generally put

421 Dublin Cycling Campaign CLG v. An Bord Pleanála [2020] IEHC 587 (McDonald J, 19 November 2020) §104
422 R v Lancashire County Council, ex parte Huddleston - [1986] 2 All ER 941
423 Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55
424 Murtagh v. Judge Kevin Kilrane [2017] IEHC 384 (High Court, Barrett J, 14 June 2017)

their best foot forward to such decision-makers – bringing all relevant material to their attention. That enures to better-informed and substantively better administrative decision-making. From a neutral (as opposed to partisan) point of view, absence of relevant material before the decision-maker impoverishes the decision-making process and so tends to diminish the quality of decisions. And agitation of such material later burdens the Courts' scarce resources with unnecessary judicial reviews seeking to have decided matters which should have been decided by the proper decision-maker. As Humphreys J said in **Reid #1**[425], withholding materials from a decision-maker, with a view to impugning the decision in a subsequent judicial review by reference to materials which the decision-maker was denied the opportunity to consider, is a form of unfair "gaslighting" of the decision-maker. If less pejoratively, the same can generally be said of merely neglecting to put relevant materials to the decision-maker - judicial review is not a remedy for l'esprit de l'escalier.

234. However, public participation in complex decision-making processes throws up countervailing issues. First, while it understandably irritates some as delaying and cumbersome, public participation is, in general terms, and at least in planning and environmental law and for the purposes of the public weal, a very good thing and to be encouraged within proper limits. The law in general terms and various ways reflects that view – one may generally cite the Aarhus Convention.

235. Further, public participation is generally and by its nature inexpert. It is laypeople venturing into often highly technical areas and often very many different highly technical areas. An applicant for an SHD planning application will generally have deployed many experts - such as planners, architects, civil and structural engineers, archaeologists, ecologists (of various varieties), environmental scientists (of various varieties), acousticians, traffic and transport engineers, daylight/sunlight/shadow analysts, geologists, hydrogeologists, hydrologists, landscapers, waste management experts and experts in generating images. No doubt I have left some out. All will have devoted considerable time, resources and expertise to their respective tasks and must, very properly, be paid at very appreciable expense. Many of their subject-matters interact in complex ways and require co-operative effort. Almost no member of the public and few groups of such members can afford to mirror such expertise and, even if they could afford it, could not hope to assemble a team in the few weeks available to object to a project which was typically many months and often many years, in expert preparation. The member of the public will perhaps have a specific concern which will help focus his/her attention – often, though far from always, fears for residential amenity of nearby residents – but the law is clear that she/he is not confined to agitating issues of personal concern or personally affecting him/her and may oppose a planning application on any proper basis. That layperson is thus often and unavoidably faced with the bewildering task of interrogating, in a relatively brief time, multifarious expert reports on arcane and technical issues, and their interactions, with a view to finding in the haystack the needle with which to try to puncture the planning application.

236. Of course, members of the public will combine – for example in residents' associations and NGOs – and fundraise to advance their concerns. But generally, the disparity of resources remains acute as compared to the intending developer. That is not to criticise the latter. But it does require recognition in considering the regime of public participation. The member of the public may not be able to afford any experts or may not know which to retain of the many disciplines engaged by the developer or may have to choose one type and omit another on grounds of expense. As a result, the general legal principle is that while members of the public may well retain experts, they are not expected to do so. Nor should they ordinarily be disadvantaged by not having done so. It suffices

425 Reid v. An Bord Pleanála & Intel #1 [2021] IEHC 230 Unreported, High Court, 12th April 2021

that they raise with the Board the issues which concern them and expect the Board to deploy its own expertise in the required critical analysis of the planning application. Thus, in **Balz**[426], O'Donnell J observed that:

> *"The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function."*

237. One might add, as to detailed scrutiny specifically in AA, reference to the view taken across the water by Lord Carnwarth in **Champion**[427], the Inner House in **RSPB v Scottish Ministers**[428], the Court of Appeal in **Mynydd y Gwynt**[429] and the High Court in **Preston**[430] that **Waddenzee**[431], in requiring certainty beyond reasonable scientific doubt of the absence of adverse effect on European Sites, required of decision-makers such as the Board a *"high standard of investigation".* That this phrase is invariably followed in those cases by the observation "*though the issue ultimately rests on the judgment of the authority"* does not diminish the obligation on the decision-maker.

238. The underlined words above from **Balz** clearly imply that objectors are not expected to have to expensively retain their own experts and may expect the Board to itself deploy all necessary expertise in the "*detailed scrutiny*" of planning applications – and do so to a *"high standard of investigation"*. But even then, the issue is not simple. In **Harrington**[432], the applicant for judicial review cited, inter alia, **Waddenzee**[433] and the precautionary principle, for the proposition that, once it raised a legitimate concern before the Board, it was incumbent on the Board to carry out its own evaluation and assessment. The applicant lost for not having raised a legitimate concern before the Board. In upholding the Board's duty of enquiry, O'Neill J held that it was not required to respond to *"a bald assertion"* "*unsupported by any credible evidence*". Recently, in **Kilkenny Cheese #1**[434] Humphreys J observed in a case concerned with AA that *"… the main consequence of not having pursued the point in the planning process is that there was no scientific evidence put before the board to contradict the Natura Impact Statement. Consequently, it cannot be maintained now that the board acted in a way which left open scientific doubt when there was no such doubt on the materials which it had."* It seems to me that in AA the relevant credible evidence will often be at least primarily, expert and/or scientific in nature. However, if one proceeds from the premise that in the planning process the objector, availing of the opportunity to object "*at no significant cost*", need not, and the Board must, deploy the relevant scientific expertise to enable detailed scrutiny, it may be that, at least in those cases in which expert or scientific evidence beyond the materials otherwise before the Board might be considered necessary to contradict the developer's NIS[435], a less demanding view will need to be taken of how much an objector need do, and what materials an

426 Balz v. An Bord Pleanála [2019] IESC 90 §45 – emphases added
427 R (Champion) v North Norfolk DC [2015] 1 WLR 3710
428 The Royal Society for the Protection of Birds v Scottish Ministers [2017] CSIH 31
429 R (Mynydd y Gwynt) v Secretary of State for Business [2016] EWHC 2581 (Admin); [2018] EWCA Civ 231
430 R (Preston) v Cumbria County Council [2019] All ER (D) 156 (May) [2019] EWHC 1362 (Admin)
431 Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (C-127/02) [2005] 2 CMLR 31
432 Harrington -v- An Bord Pleanála [2014] IEHC 232
433 Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee & Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, Judgment Of The Court (Grand Chamber) 7 September 2004
434 An Taisce v. An Bord Pleanála Dismissing the application for judicial review: [2021] IEHC 254
435 Humphreys J in Reid #2 - Reid v An Bord Pleanala & Intel [2021] IEHC 362 – clarified that his observation in Reid #1, saying "That does not mean that no applicant who does not produce its own evidence can challenge a NIS. It just means that this particular applicant cannot because there was not otherwise before the board any "materials which it had" that left open scientific doubt. Those materials could include materials put before the board by the developer and by other parties. For the avoidance of doubt, the board is not obliged to accept an NIS simply because it is uncontradicted. Them NIS could have inherent flaws on its face, …"

objector must place before the Board on an issue, in order to trigger the Board's obligation to carry out its own investigation, evaluation and assessment of that issue in AA. Of course, such problems should arise in practice only as to those issues of which it can be said that, on the materials before the Board, the Board did not have an autonomous duty to investigate the issue. Given the Board's autonomous duty requires a *"high standard of investigation",* it may be that this issue will not often arise in practice.

239. In the context of AA, this view that objectors are not expected to have to retain their own experts in making submissions in the planning process is consistent with the recognition by Humphreys J in **Reid #2**[436] that the Board bears *"an autonomous obligation to subject the developer's Natura Impact Statement to analysis that is informed by sufficient expertise …… to bring the necessary level of expertise to bear on the assessment of the developer's material for the purposes of the habitats directive."* Indeed, in this regard Humphreys J used the phrase: *"whether an objector pointed out any alleged deficiency or not".* In **Reid #1**[437] he had upheld the right of an objector to not *"correct the other party's homework or to point out omissions the correction of which during the process would enable the application (which is being opposed) to be corrected and improved. An objector is entitled to rely on the decision-maker to identify such gaps or omissions and retains an entitlement to complain to the court (for the first time) if that is not done."* But in **Reid #1** he also said:

> *"On the other hand, if the objector wants the decision-maker to take into account something positive that is additional to anything the other party is obliged to put forward (whether or not that party actually puts it forward), then the objector must positively raise that additional matter in order to have a case later. For example, if the issue is whether scientific doubt as to effect on a European site precluded the grant of permission, an objector has to bring something into the process that raises such a doubt, <u>if doubt wouldn't otherwise arise</u>. Failure to do so maybe doesn't preclude being allowed to go through the motions of a challenge later but it renders the challenge empty, and devoid of any prospect of success, because the issue in that challenge would be whether there was <u>doubt by reference to the material before the decision-maker</u>, not by reference to new matters the applicant thought of after the event."*[438]

Counsel for ETI submitted[439] that, in referring to *"the Applicant"* in this passage as having made an "empty challenge", Humphreys J had in mind the applicant for planning permission, not the applicant for judicial review, such that his reasoning could not apply to ETI. It is difficult to say more than that on my reading of the entire passage I must respectfully disagree. But on the facts of this case that view does not disadvantage ETI.

240. Humphreys J in **Reid #2** added that "*Sufficient expertise means fully understanding the developer's material in all its aspects*." – *"Not as it appears to a planning generalist without detailed expertise in the particular sub-specialty to which any given document relates. A document can only be accepted if it is fully understood …"* Thus as, for example, relates to hydrogeology, the Board's compliance with its autonomous obligation will be assessed on the assumption that it must apply the expertise of the reasonable hydrogeologist. Again, this chimes with the *"high standard of investigation"* required by the English cases.

436 Reid v An Bord Pleanala & Intel [2021] IEHC 362
437 Reid v. An Bord Pleanála #1 [2021] IEHC 230 Unreported, High Court, 12th April 2021
438 Emphases added
439 Day 2 p133

241. On that view, that objectors are not expected to have to retain their own experts in making submissions in the planning process, it may on particular facts be unfair to criticise objectors for raising an issue for the first time in judicial review or for deploying an expert for the first time in judicial review – especially where that issue is one which the Board should have considered in fulfilling its autonomous obligation to investigate and to deploy its own and sufficient expertise, to fully understand the developer's material in all its aspects and to analyse the application accordingly. Not least, the issues may have been narrowed and focussed by the impugned decision such that, in approaching judicial review, the need for and choice of expert in a particular area and not in another may have become more apparent to the objector, and an expert can be retained on an issue which was actively put before the Board and/or on an issue which was not raised by objectors who now say the Board's decision reveals a failure, of its autonomous obligation, to address that issue.

242. However, allowing the agitation of such issues for the first time in judicial review implies at least a tendency towards judicial review on the merits. But in judicial review of AA, as in all judicial review, review on the merits is not available - "*The test is one of the legality of the decision and not its correctness"* – **Sweetman v An Bord Pleanála & Wexford County Council**[440] and *"It is not for the court to assess the correctness or otherwise of the conclusions reached by the Board, provided that the Board approached its assessment …. in accordance with the correct legal test …. and provided that there was material to support the Board's conclusions …"* - **Rushe**[441] and *"… the correctness, as opposed to the legality, of a decision is for the decision-maker rather than the court"* - **Clifford**[442]. But in turn, that judicial review on the merits is not available implies that, by not retaining expertise at the decision-making stage, which the law does not expect of them, the objector may have missed the chance to properly agitate a genuine issue on its merits.

243. Systemically and vitally, of course, the only general remedy for this difficulty is that the decision-maker will indeed, independently, demonstrably and impartially, deploy sufficient expertise, detailed scrutiny and a high standard of investigation and have the resources with which to do so. And, properly, decisionmakers are presumed at law to have done so. But that systemic observation does not answer the question posed in an individual judicial review of the canvassing of an issue not addressed by anyone, including the Board, in the impugned process or the admission or rejection of expert evidence which was not before the Board on such an issue or, indeed, on an issue which the Board did address.

244. It has proved difficult to erect a satisfactory and generally-applicable framework of rules to address these issues as to the scope of judicial review specifically as it relates to AA and the introduction of new issues and/or evidence in judicial review. The difficulties can perhaps be illustrated by the fact that in **Reid #1**[443], having stated a general rule that an applicant should normally raise her point with the decision-maker first, before doing so by way of judicial review, Humphreys J very helpfully identified exceptions – of which there were no less than 16. And even as to the exception for a jurisdictional complaint, in **Kerins**[444] Humphreys J pointed out, in rejecting a challenge to an AA, that "*not all jurisdictional objections can be saved for the judicial review."*

440 [2010] IEHC 53
441 Rushe & anor -v- An Bord Pleanala [2020] IEHC 122 (High Court (Judicial Review), Barniville J, 5 March 2020)
442 Clifford v. An Bord Pleanala, O'Connor v. An Bord Pleanala [2021] IEHC 459 (High Court (Judicial Review), Humphreys J, 12 July 2021)
443 Reid v. An Bord Pleanála (No. 1) [2021] IEHC 230 (Unreported, High Court, 9th April, 2021)
444 See below

245. Notably, albeit obiter but in reliance on **Hennessy**[445] and **People Over Wind**[446], McDonald J said in **Sliabh Luachra**[447], as to pleaded grounds, *"For the court to entertain material that was not placed before the respondent runs the risk of subverting the role of the court in proceedings of this kind. The court is not engaged in a de novo hearing. The court does not itself carry out an appropriate assessment. That is a matter entirely for the respondent. It is not for the court to conduct an appropriate assessment on different material to what was before the respondent in order to reach a different conclusion."* I am inclined to think that here McDonald J was referring to factual, as opposed to expert opinion, evidence - as I think was Haughton J in **People Over Wind**[448] - and so did not intend to exclude, for example, expert opinion evidence adduced first in judicial review that, on the materials which were before it, the Board should have had a scientific doubt as to the prospect of adverse effect on European Site integrity. And in **Reid #1**[449] and for reasons which he sets out in some detail, Humphreys J concludes that **Hennessy** *"only addresses a fragmentary view of the position rather than being a comprehensive statement of the law in this area. There is no one-size-fits-all answer, but rather competing approaches depending on the precise context .."* He cites **Fordham**[450], in turn citing **Turgut**[451] and the House of Lords **Launder**[452] for the proposition that *"[t]he court will not shut out evidence which is relevant to the issues … [t]he evidence is not strictly limited to evidence which was or should have been before the Secretary of State at the time of the decision."*

246. **Kerins**[453] considered a pleaded breach of the Habitats Directive by failure to consider an alleged direct hydrological connection between the development site and the River Poddle. Humphreys J cited **Reid #1**[454] to the effect that such points must be grounded in evidence that was before the decision-maker – which the alleged hydrological connection was not. So, Humphreys J said, *"this allegation constitutes new evidence that should not be entertained now. The first the board heard about it was in the statement of grounds. Calling appropriate assessment "jurisdictional" does not get over this problem. The habitats directive could be a locus classicus of the sort of detailed technical and scientific examination that needs to be carried out by the decision-maker and not for the first time by the court. Even accepting that AA is technically jurisdictional, not all jurisdictional objections can be saved for the judicial review. Scientific evidence relating to environmental effects should be before the decision-maker if an applicant wants to rely on it later, as Reid No. 1 makes clear."* However, I confess that I am unclear whether the scientific evidence in that case was factual as well as opinion.

445 Hennessy v. An Bord Pleanála [2018] IEHC 678. This was a domestic law planning case, not an AA case. Murphy J said, inter alia, of the Applicant: " …. he, now by the mechanism of judicial review, seeks to introduce new arguments to challenge the decision of the Board; arguments which should have been addressed in submissions to the Board. That is not permissible. All sorts of mischief would ensue were parties permitted to advance in a judicial review argument which they could have, but did not, advance to the decision maker. ……. The courts do not consider fresh evidence, that is evidence which, if it had been put before the decision maker, might have influenced his decision……."

446 People over Wind -v- An Bord Pleanála [2015] IEHC 271 (High Court, Haughton J, 1 May 2015). This was an AA case in which the Board and Coillte objected to the admissibility of expert evidence for the Applicant primarily on the basis that it included new evidence and opinion evidence not before the Board at the time of the impugned decision. Haughton J treated "new evidence" and "opinion evidence" separately, which suggests that by "new evidence" he meant new factual evidence. Of that, he simply said: "In so far as the affidavit contains new evidence that was not before the Board, the Court is compelled to disregard such evidence." Of the opinion evidence he merely said that, for reasons given, he did not find it helpful. So he does not seem to have excluded it as inadmissible. No authority was cited.

447 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanala [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019)

448 See footnote above

449 Reid v. An Bord Pleanála (No. 1) [2021] IEHC 230 (Unreported, High Court, 9th April, 2021)

450 Judicial Review Handbook (Oxford, Hart, 2012), §17.2.1

451 R. v. Secretary of State for the Home Department, ex parte Turgut [2001] 1 All ER 729 at 735

452 R. v. Secretary of State for the Home Department, ex parte Launder [1997] 1 WLR 839 [at 860H to 861B]

453 Kerins v. An Bord Pleanala [2021] IEHC 369 (High Court (Judicial Review), Humphreys J, 31 May 2021)

454 Reid v. An Bord Pleanála (No. 1) [2021] IEHC 230 (Unreported, High Court, 9th April, 2021)

247. These issues were recently considered in **Heather Hill #2**[455], to the following broad conclusions:

- The validity of the AA is in general to be judged in judicial review on the basis of the materials which were before the Board.

- An applicant for judicial review generally may not adduce new factual evidence as to scientific doubt[456].

- An applicant for judicial review may adduce expert opinion evidence that, on the basis of the material which was before the Board, the Board ought to have had a reasonable scientific doubt as to adverse effect.

- Where the allegation is that the AA contained a lacuna by way of a failure to recognise a specific risk at all, it presumably must be incumbent on the applicant for judicial review to persuade the court that the putative risk is not merely "*hypothetical*" or "*conceivable*" but is one with which the Board should have "*bothered*". That may be a light burden but, being a burden nonetheless, presumably must involve at least some consideration of the questions of the "*conservation objectives"* of the site "*the characteristics and specific environmental conditions"* of either site, "*the likelihood of harm occurring and the extent and nature of the anticipated harm*".

248. Unlike in **Heather Hill #2**, ETI in this case did adduce expert evidence asserting a risk of cement leaching - though not expert evidence as to the possibility of consequences for the integrity of the SAC in the manner envisaged above.

249. Humphreys J in **Flannery**[457] referred to expert evidence introduced by the applicants first in judicial review regarding points not specifically made to the Board. Citing **Reid #1**[458] Humphreys J said he had "*generally not regarded any new expert evidence as permissible, save insofar as it comes within a recognised category such as by drawing attention to matters that it is contended should have been evident to the board on the face of the material*." It seems to me that an assertion, such as that as to cement leaching in this case, that the material before the Board disclosed a real risk which the Board should have autonomously identified, comes within the exception thus identified by Humphreys J. I say this not least as, having taken the view that concrete poured onto or into bedrock containing groundwater must be a commonplace of development, such that knowledge of its characteristics and the issues arising from it must be well within the Board's expertise, it follows that if cement leaching is a real risk the Board should have adverted to and considered it in AA. As will be seen, the phrase "if cement leaching is a real risk" is important here.

250. On the basis that the facts relevant to the posited issue of cement leaching were before the Board, I hold that Mr Duffy's opinion evidence that those facts disclose a risk of cement leaching is admissible in evidence and ETI can argue for the first time in judicial review (not having done so

455 Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 (High Court (Judicial Review), Holland J, 16 March 2022) §260 etc

456 But even to this limitation on adducing new factual evidence there must be exceptions. For example, if the allegation is that the Board failed to have regard to best scientific knowledge, presumably the Applicant can place before the Court what it alleges is in fact the best scientific knowledge, thereby to demonstrate that the Board failed to take it into account.

457 Flannery v An Bord Pleanála, Tempelogue Synge Street GAA Club & Ors [2022] IEHC 83

458 Reid v An Bord Pleanála (No. 1) [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April 2021)

before the Board) that, on the materials before it, the Board ought to have had a reasonable scientific doubt as to adverse effect on the integrity of the SAC by reason of cement leaching to groundwater.

General Issue of Dispute as to the Existence of a Risk

251. However, it seems important to me to observe that whether even a light burden of raising an issue has been discharged may be disputed. If it is disputed, then evidence is admissible on both sides and the question arises of resolving that dispute.

252. Risks conceivable in theory but non-existent in reality must be legion – the risk of satellite-strike on a site may be an example[459]. As I observed at trial, requiring an NIS and AA to identify and record non-existent risks for the purpose of recording them as non-existent would be a recipe for pointlessly endless documents once the requirement is applied – in prospect as opposed to in the focussed hindsight of judicial review - to all the disciplines and all the circumstances of any development. I imagine it would not be without at least appreciable pointless expense – if only for the time to be spent by experts, perhaps many, attempting to conceive of all conceivable risks in order to discount them as non-existent and at risk of failure of the AA if their imagination fails them. I cannot see that AA imposes such a pointless requirement.

253. Yet it must, of course, be open to an applicant in judicial review to impugn an AA by positing a risk not addressed in the AA. I accept the bona fides of ETI in pointing to a risk of cement leaching in this case – not least as expert evidence supports their doing so. But, that said, it follows that it must equally be open to a developer, often by its experts, and the Board, to say that a risk thus posited is non-existent or lacks reality - such that it need not have been addressed in an NIS and AA. In short, there can be dispute whether a posited risk exists - is real as opposed to merely conceivable.

254. It seems to me that three observations point to the answer to this issue which will arise, ex hypothesi, only in judicial review in respect of a posited risk not addressed in the NIS and AA.

- The first is that there is ample authority – for example **Sliabh Luachra**[460] and **Heather Hill #2**[461] - that scientific doubt as to risk to the integrity of a European site must, to prevent development consent, be reasonable and real - not merely theoretical or hypothetical. And AG Kokott said in **Waddenzee**[462] that *"it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment".*

- The second is that AA Screening requires AA only of risks which "might" significantly affect a European Site.

459 An example posited at trial. This may not be the best example, as planning applications for developments involving orbiting satellites are thankfully rare. Perhaps this is a modern version of the only fear of Chief Vitalstatistix - that the sky would fall on his head. Or perhaps not. However, I do not suggest that the risks alleged by ETI are fanciful in this extreme sense or seek to denigrate their agitation or suggest that ETI's fear is less than genuine. My purpose is merely to illustrate that some risks are conceivable but unreal.
460 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanala [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019)
461 Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 (High Court (Judicial Review), Holland J, 16 March 2022)
462 Case C-127/02 – Opinion of 29/1/4

- The third is that the precautionary principle overarches the issue.

Taken together, these observations imply a light burden on the applicant for judicial review in positing a risk not addressed in the NIS and AA as justifying reasonable scientific doubt – but nonetheless, it is a burden.

255. In similar vein in **Heather Hill #2**[463] the following can be found:

> *"268. An NIS is not an encyclopaedia. An objector will almost always be able to point to some fact not recorded or alleged issue not addressed in an NIS. How is the court to discern whether such an absence (to use a neutral term) from the NIS constitutes a "lacuna" of legal significance? The absence of particular information from an NIS does not constitute a lacuna save by reference to the purpose of AA. The Applicant cannot just point to a supposed lacuna in a sense unrelated to a prospect of adverse effects on the integrity of a European Site having regard to its conservation objectives. The difference between a mere absence and a "lacuna" must turn on the question whether it is such as to raise a reasonable scientific doubt as to the absence of adverse effect on the integrity of a European site in light of its conservation objectives and of the characteristics and specific environmental conditions of the site concerned and of the likelihood of harm occurring and the extent and nature of the anticipated harm. Or, conversely, is the absence one likely to have "no appreciable effect"* [464] *given "it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment"*[465]*? In a sense, the question posed by an applicant in judicial review alleging a lacuna in AA in the form of an issue allegedly not addressed is an AA screening question. To paraphrase AG Sharpston in* ***Sweetman & Ireland****: ought the Board have bothered to check that issue? How, and on what materials, is the non-expert court to answer that question without reference to scientific evidence and discern whether such a scientific doubt does or does not exist by reference to such alleged "gap or lacuna" when the premise of the inquiry is that the issue was ignored in the AA?*
>
> *269. Or does the evidential burden on the Board*[466] *imply that all an objector need do is point to any absence from an NIS, call it a "lacuna" without any analysis or evidence of its significance by reference to potential adverse effect on the integrity of a European site having regard to its conservation objectives and then adopt the supposed approach of Lyndon Johnson – "Make the Board*[467] *deny it"? That seems unlikely.*
>
> *270. It must also be remembered that, by ss 50 and 50A PDA 2000, an intending applicant for judicial review requires leave to seek it and to get that leave must show "substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed" – failing which the Court "shall not" grant leave.*[468] *And the "substantial grounds" requirement, that the grounds be "weighty"*[469]*, imposes a higher burden on an applicant for leave than is imposed in non-planning judicial reviews:* ***Morris***[470]*. This clearly*

463 Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 (High Court (Judicial Review), Holland J, 16 March 2022) §268 et seq.
464 Kelly (Eoin) v. An Bord Pleanála & Aldi [2019] IEHC 84, §68(6)
465 As AG Kokott said in Waddenzee – see above.
466 As to which, see further below.
467 For the avoidance of doubt, it is not suggested that Mr Johnson used the word "Board".
468 S.50A(3) PDA 2000
469 McNamara v. An Bord Pleanála [1995] 2 I.L.R.M. 125; Morris v. An Bord Pleanála [2020] IEHC 276 (High Court (Judicial Review), McDonald J, 8 June 2020
470 Morris v. An Bord Pleanála [2020] IEHC 276 (High Court (Judicial Review), McDonald J, 8 June 2020 §11

requires that, to get leave by reference to alleged inadequacy of AA, the applicant for judicial review must show substantial grounds for contending that the AA was inadequate. This must impose a burden of some degree – consistent with Hogan J.'s imposing the legal burden on the Applicant. Indeed, if there was no burden on the Applicant at that point, the leave application would be pointless in AA cases as its grant would be virtually automatic."

271. Of course, it could be suggested that where, as here, leave to seek judicial review has already been granted and there was no application to set it aside, we are past any point at which the Applicant would bear a burden. But that seems inconsistent with:

- *the fact that leave to seek judicial review is precisely that – permission to start proceedings as opposed to determination of any issues in those proceedings.*
- *the general principle of fair procedures (audi alteram partem) that decisions made ex parte can be revisited inter partes.*
- *the generally applicable presumption of validity of impugned administrative decisions.*
- *the confirmation by Hogan J. in **Kilkenny Cheese** that the legal burden of proof of invalidity of an AA always remains on the Applicant for judicial review.*

*272. In **Kelly (Eoin)**[471] Barniville J, as to AA Screening, held[472] that the applicant had "failed to discharge the onus of proof which rests on him …. to show that there were gaps or lacunae in the screening report relied on by the Board's inspector to screen the application for this development for appropriate assessment."*

*273. More generally, the question of the burden on an applicant for judicial review of an AA is to be considered in the context of the observation of McDonald J. in **Sliabh Luachra**[473] to the effect that "decisions should not be made on a purely hypothetical approach to risk founded on mere suppositions which are not scientifically verified."[474] and AG Kokott's observation in **Waddenzee** that "it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment".*

256. There followed in **Heather Hill #2** a consideration of the difference between the legal and evidential burdens of proof and of the "*reasonable expert*" test of reasonable scientific doubt found in **Reid #2** and the conclusion[475] set out above that, where the alleged lacuna in the AA was by way of a failure to recognise a specific risk at all, a light burden but a burden nonetheless, lies on the Applicant to persuade the court that the posited risk is not merely "hypothetical" or "conceivable".

257. One can look at this issue of experts' conflict in another way. Recently, in **Madden**[476] Ferriter J, obiter and in light of what he found the "compelling" obiter of Humphreys J in **Reid #2**[477], doubted the applicability of the O'Keeffe "no evidence" standard to judicia review of AA for irrationality where the determination favoured the project[478]. As I have said earlier, I need not address that issue here. But in so doing Humphreys J observed that:

471 Kelly (Eoin) v. An Bord Pleanála & Aldi [2019] IEHC 84
472 Citing Harrington v. An Bord Pleanála [2014] IEHC 232 and An Taisce v. An Bord Pleanála [2015] IEHC 633
473 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019) McDonald J, in rejecting a challenge to a finding in AA discounting the risk of peat slippage and having considered Case C-236/01 Monsanto [2003] ECR I-8166 and Case C-127/02 Waddenzee [2004] ECR I-7448
474 Citing Case C-236/01 Monsanto [2003] ECR I-8166
475 §280
476 Madden v. An Bord Pleanála [2022] IEHC 257 (High Court (Judicial Review), Ferriter J, 4 May 2022)
477 Reid v. An Bord Pleanála & Intel #1 [2021] IEHC 362 §43 et seq
478 Ferriter J's view was obiter as his was a case of refusal of planning permission, to which he considered O'Keeffe rules applied.

- *If reasonable people could disagree about whether there is a doubt, then there is a doubt, even if each individual viewpoint would in isolation survive O'Keeffe scrutiny.*
- *Thus the traditional, unmodified, O'Keefe wording, that the decision stands if there is material to support it, simply can't be right in the AA context.*
- *"The test is not whether the applicant has demonstrated that no reasonable decision-maker could have concluded that there was no scientific doubt. The test is whether the applicant has demonstrated that a "reasonable expert" (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker) could have a reasonable scientific doubt as to whether there could be an effect on a European site. One could, as the board in the present case seemed to be suggesting, turn this into a merely semantic issue by redefining the application of O'Keeffe to produce a meaning in which it could make sense in the exclude-all-doubt context, but that would be a fairly tortured exercise.*

258. One can read Humphreys J's obiter, especially the observation as to AA that *"If reasonable people could disagree about whether there is a doubt, then there is a doubt …",* as suggesting that, as Ferriter J put it, in a situation of dispute between reasonable experts as to whether there is a reasonable scientific doubt, ipso facto[479] there is a doubt and, permission must[480] be refused. As counsel for ETI pithily characterised the obiter: "*Where two experts disagree there is a reasonable doubt*" and "*A reasonable doubt exists if two experts have different views on the same topic*"[481]. The initial attraction of the argument is apparent. Nonetheless, I would be extremely reluctant to adopt such a view.

259. To apply such a view to the AA in this case could be to hold that merely because the posited risk of the occurrence[482] of cement leaching to groundwater has been identified by the expert for ETI as a real risk, there must necessarily be reasonable scientific doubt on that issue such that the Impugned Decision must be quashed for deficiency in the AA.

260. Such a view could, in effect, give any apparently reasonable expert a unilateral and automatic veto over development and in effect take the decision out of the hands, not just of the court exercising its jurisdiction in judicial review, but even of the competent and expert decision-maker designated by the Oireachtas to make the AA determination.

261. It is no insult to the many reputable experts who come before the Board and the Courts (and none either to the experts in this case) to observe that experts can be found in support of many conflicting propositions – the Courts see the phenomenon daily. The Courts expect, and largely get, independence and impartiality of expert witnesses but recognise the reality that "*despite their best endeavours to be impartial, experts can on occasion become too aligned in their opinion to the case their client wishes to advance*" and that "*A [a] judge must bear in mind that, notwithstanding that an expert may firmly declare a duty to the court, it is a natural aspect of human nature that even a*

479 "Ipso facto" are my words not Ferriter J's but that is how I read his views.
480 My emphasis
481 Day 1 p72 and day 3 p250
482 Leaving aside for now the question of effect on European Sites if it does occur.

professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that side's team" and, indeed that *"T[t]his is a particular danger for forensic experts whose practice is mainly concerned with litigation, as inevitably and understandably, such experts will only be retained by parties whose case the expert will support."* See **O'Flynn**[483] and **Naghten**[484].

262. Putting one's fears at a height one would hope would rarely be realised, MacMenamin J. (for the Supreme Court) stated in **O'Leary**[485]

> *"What may not always be clear, is that some cases where the ultimate outcome will be clear-cut actually come as far as the courtroom because of what are called 'hired gun' witnesses on one side or the other. Quite often the deficiencies in the testimony of such witnesses are discovered only at the door of the court or in the hearing itself, by which time the parties may have incurred significant costs."* [486]

Notable here is the identification not merely of the problem but of the solution often required - the actual testing of the respective experts in court - *in the hearing itself* – obviously by cross-examination[487].

263. While planning decision-making procedure is inquisitorial not adversarial[488] one would have to live in a fantasy world to not accept that interactions between putative developers and objectors in planning contexts are very often highly disputatious and vehemently adversarial (in the colloquial sense of that word). I see no reason to imagine that experts on both opposing sides of a planning application are in any different a position to those in litigation and clearly, just as judges must impartially bear that in mind, so too must the Board.

264. I repeat that none of the foregoing is to doubt the integrity of the expert witnesses in this case – or indeed, generally. It is rather to explain why I respectfully consider that the mere fact that an apparently reputable expert sees a reasonable scientific doubt as to adverse impact on a European site or as to the existence and significance of a particular risk cannot be determinative of AA. Nor do I see a need that it should.

265. The courts are well used to choosing between the conflicting views of experts. It is often their duty to do so – as it may often be the duty of the Board. Courts do so on the balance of probabilities in civil cases and, even more strikingly, lay juries do so in criminal cases to a standard of proof beyond reasonable doubt. In the end it is, and must in law be, the decision-maker and subsequently the Courts, and not the respective experts, who decide in AA whether there is a reasonable scientific doubt. It may, of course, be the case that in the great majority of cases where a reasonable expert testifies to a risk, reasonable scientific doubt will ordinarily be found and it may be the case that a decisionmaker who, despite such testimony, finds no such doubt will be obliged to give particular reasons for its resolution of that issue. But in AA the determination whether there is a reasonable scientific doubt is a core task, and fundamentally the task, of the decision-maker, whether the Board or the Court in judicial review – not of the competing experts.

483 O'Flynn v. Health Service Executives [2022] IECA 83 (Court of Appeal (civil), Noonan J, 1 April 2022)
484 Naghten v. Cool Running Events Ltd [2021] IECA 17 (Court of Appeal (civil), Noonan J, 26 January 2021)
485 O'Leary v. Mercy University Hospital Cork Limited [2019] IESC 48
486 Emphases added
487 See further below.
488 In the technical sense in which that word is used by way of contrast with inquisitorial process

266. A further consideration tending to this view lies in the fact that, whatever the limitations on their doing so, at least in some circumstances and as canvassed above, an applicant in judicial review may adduce in judicial review expert opinion evidence not tendered to the Board – for example to identify a risk not addressed in the AA. A rule that merely doing so suffices to indisputably generate reasonable scientific doubt, would be, as Humphreys J might have put it in **Reid #1**[489], a gaslighters' charter.

267. For the foregoing reasons if, in judicial review, experts dispute the issue of whether a posited risk is real, such that an AA is deficient for not addressing that risk, the evidence of the expert for the applicant for judicial review does not automatically trump that of the evidence of the experts for the respondent Board/notice party developer. One way or another, the dispute must be resolved by the Court.

Method of Resolution of Dispute as to Existence of Risk

268. Often, as here, a disputed question on which side of the low threshold of reality a posited risk lies may turn on expert evidence. As I have said, in such a dispute it will not suffice for the applicant in judicial review to say that once its credible experts have identified a risk the AA must be quashed if it did not address that risk, regardless whether the Respondent or Notice Party adduces contrary expert evidence. What matters is that the applicant for judicial review does face a burden of proof on an issue as to which the respective experts are in dispute. Whether that burden has been met is a relevant dispute – requiring resolution.

269. So, where experts dispute on affidavit in judicial review of AA the existence of a risk by reference to that low threshold, the dispute must, at least in most cases, be resolved by cross-examination. Absent such cross-examination, the party which bears the onus of proof on the issue fails on it. For these propositions, the Board and Cloncaragh, correctly in my view, cite and emphasise[490] the decision of the Supreme Court in **RAS Medical**[491] in which Clarke CJ held it:

- impermissible to determine contested questions of fact on the basis of affidavit evidence.

- incumbent on the party who bears the onus of proof of establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact. If that party fails to discharge that onus the disputed fact is decided against it.

489 Reid v An Bord Pleanála & Intel [2021] IEHC 23
490 Counsel for Cloncaragh said of RAS Medical – "that is the end of the case when it comes to everything to do with habitats" – Day 3 p173
491 RAS Medical Ltd v. Royal College of Surgeons in Ireland [2019] 1 IR 63

270. Of **RAS Medical,** Butler J in **Re Bayview Hotel**[492] recently said:

> *"The implications of **RAS Medical** are far reaching. ……. (it) positively requires a deponent to be cross-examined whenever evidence is objected to on grounds of credibility or reliability and even where the affidavit evidence is contradicted by other documentary evidence … Clarke CJ goes so far as to say that it is impermissible to ask a decider of fact to determine a contested fact on the basis of affidavit evidence or documentation alone. Therefore, in a case being tried on affidavit where the facts are disputed, the failure to cross-examine an opposing deponent can, and generally will, be fatal to the party bearing the onus of proof on the issue to which that deponent's evidence is relevant."*

271. I respectfully agree with Butler J that the implications of **RAS Medical** are far-reaching, for the reasons she gives and for the final disposal[493] of many types of litigation in which evidence is generally adduced on affidavit. The implications may also, in some quarters, be unwelcome to the extent that increased complexity, duration and cost of litigation are likely to be amongst them. That may be especially so in environmental judicial review, in which expert disagreement is not uncommon. But their foundation in the logic of fair procedures is clear, as is the law, laid down in **RAS Medical** and giving rise to those implications.

272. Indeed, on the facts and having regard to the issues in **Re Bayview Hotel**, Butler J held that the petitioner to wind up the company had failed, for want of cross-examination of the witness opposing the petition, to prove the debt alleged to have underlain a statutory demand to the company for repayment[494]. However, Butler J does observe that the question of the need for cross-examination is rarely as straightforward as the general proposition set out above suggests. Not every contested fact will be crucial to the issues the court is to determine. Clarke C.J. recognised that, other than reliability or credibility, there may be factors bearing on the court's attitude to disputed evidence. Much will depend on exactly what the court is required to determine and on the extent to which, and the basis on which, the evidence is challenged.

273. I should add that, for this purpose, there is no difference between a dispute of fact in the ordinary sense and a dispute of opinion between experts[495] – see **Somague**[496] to the effect that:

> *"(e) There may be examined not merely facts taken in a narrow sense but also the construction, or interpretation, or conclusions that a person draws from those facts, and cross-examination may be permitted in those circumstances even if there is no real dispute as to those material facts.*
>
> *(f) Thus, opinions and conclusions may be tested by cross-examination both as to their reliability or reasonableness as the case may be."*

492 Re Bayview Hotel (Waterville) Limited [2022] IEHC 516

493 The position is different as to interlocutory applications – see Trafalgar Developments Ltd v. Mazepin [2021] IEHC 69 (High Court (General), Barniville J, 1 February 2021)

494 In the event Butler J found the company unable to pay its debts and ordered a winding up on a basis other than its failure to repay on foot of a statutory demand.

495 Though there may be exceptions to a requirement for cross-examination. For example, it may prove possible to prefer one expert opinion to another, despite both being on affidavit, having regard to any resolution of disputes as to the facts on which the expert opinions ought to have been based and any differing assumptions made by the experts in that regard.

496 Somague v. Transport Infrastructure Ireland [2015] IEHC 723 §17; cited in Trafalgar Developments Ltd v. Mazepin [2021] IEHC 69 §49 (High Court (General), Barniville J, 1 February 2021)

274. Finally, in this regard and without deciding a point not argued, much less giving a detailed account of the applicable principles, I should point out that the need for cross-examination in judicial review arises, when it does, as a matter of fair procedures and as stemming from the generally adversarial nature of the process[497] before non-expert courts. That does not, of itself or generally, imply a need for cross-examination in the planning process before the Board. The expert Board is engaged in a very different form of procedure, in which the requirements of fair procedures operate - but differently than they do in court procedures. As Costello J said in **O'Brien**[498], the Board is engaged in an administrative decision-making process and not primarily in deciding disputes between parties. The expert Board may often, depending on circumstances and without an oral hearing, prefer one set of expert opinions over another in the exercise of its planning judgment - **Atlantic Diamond**[499].

The Onus of Proof

275. In the absence of cross-examination, the foregoing analysis implies that, in this judicial review, the dispute between the respective experts whether cement leaching is a real risk falls to be resolved against whomever bears the onus of proof on that issue.

276. ETI says that once an expert testifies to the existence of reasonable scientific doubt by reason of a risk not addressed in the AA, the Board bears the onus of showing a that risk/doubt purely hypothetical or unreal – such that it bears the risk of failure to cross-examine. The Board and Cloncaragh say ETI bears to onus of showing that the risk is real such that ETI bears the risk of failure to cross-examine.

277. Generally in judicial review, including planning and environmental judicial review, the impugned decision, is presumed valid and the onus of proving otherwise lies on the applicant for judicial review – in this case ETI. As was recently said in the **MRRA** case[500]:

> *"The starting point in planning and environmental judicial review is that "…the Board's decisions enjoy a presumption of validity until the contrary is shown" - **Ratheniska**[501]. The presumption is rebuttable but the applicant for judicial review bears the burden of rebutting it and so proving invalidity. This implies that an applicant must lay a proper basis for criticisms of the adequacy of the Board's planning and environmental assessments and decisions."*

Similar observations were made by the Court of Appeal in in **Redrock**[502].

497 Though judicial review has significant non-adversarial characteristics – not least that the decision-maker has no partisan interest in upholding its decision and its primary duty is to assist the court in arriving at the correct decision - R v Lancashire CC ex p. Huddleston [1986] 2 AER 941; Murtagh v. Judge Kevin Kilrane [2017] IEHC 384 (High Court, Barrett J, 14 June 2017); Protect East Meath Limited v. An Bord Pleanala [2020 No. 44 JR] (High Court (Judicial Review), McDonald J, 19 June 2020)
498 O'Brien v. An Bord Pleanála & Draper [2017] IEHC 733 (High Court, Costello J, 19 December 2017)
499 Atlantic Diamond Ltd v. An Bord Pleanala [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021)
500 Monkstown Road Residents' Association v. An Bord Pleanála [2022] IEHC 318 (High Court (General), Holland J, 31 May 2022)
501 Ratheniska v An Bord Pleanála [2015] IEHC 18, Haughton J.
502 Redrock Developments Ltd v. An Bord Pleanala [2019] IEHC 792 (High Court, Faherty J, 21 October 2019)

278. However the position is more complex in judicial review of AA[503] - as is recorded by the High and Supreme Courts in **Kilkenny Cheese**[504] and the High Court in **Heather Hill #2**[505]. But even in AA, as Allen J in **Kemper**[506] noted, *"the court will acknowledge and respect the expert knowledge and expertise of the authority entrusted by law to make the decision."* As was observed in **Heather Hill #2**[507], it must also be remembered that in AA the doubt at issue is specifically scientific. The Board is expert: the court is not. McDonald J., though in **Sliabh Luachra**[508] considering a risk discounted by an expert as "negligible", took what seems to me a general view that *"As an expert body, the respondent is in a much better position than the court to form a view as to whether a risk …. is sufficiently remote to be discounted in the context of an Article 6(3) appropriate assessment of risk."*

279. **Kilkenny Cheese** is binding authority that as to the validity of AA, the legal burden of proof remains with the Applicant for judicial review but there is an evidential burden on the Board. Hogan J said that:

> *"While the legal burden of demonstrating the invalidity of any grant of planning permission in cases arising under the Habitats Directive will always rest with the applicant, …….. the evidential burden rests with the Board to demonstrate that it has conducted an AA which meets the requirements of Article 6(3)".*[509]

And **McGrath**[510] describes the legal burden, in an illustrative phrase, as that upon the party bearing "*the risk of non-persuasion*"[511] and says:

> *"The "legal burden" is a burden of proof properly so called and is the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact or matter. …… If the party fails to discharge this burden, then he or she will lose on that issue. It can be seen, therefore, that the legal burden allocates the risk of failure in proceedings."*

280. As observed in **Heather Hill #2**, the application of the rule laid down in **Kilkenny Cheese** to particular facts is not without its difficulties but, as recited above, the conclusion in **Heather Hill #2** was that where:

> *"……. the allegation is that the AA contained a lacuna, …. by way of a failure to recognise a specific risk at all, it presumably must be incumbent on the Applicant to persuade the court that the putative risk is not merely "hypothetical" or "conceivable" but is one with which the Board should have "bothered". That may be a light burden but, … a burden nonetheless …"*

503 See the various judgments in the Kilkenny Cheese case: An Taisce v An Bord Pleanála: [2022] IESC 8 §115 et seq: [2021] IEHC 254: [2021] IEHC 422. See also Reid v An Bord Pleanála (No. 1) [2021] IEHC 230, Flannery v An Bord Pleanála, Tempelogue Synge Street GAA Club & Ors [2022] IEHC 83, Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 §263 et seq.
504 An Taisce v. An Bord Pleanála - Dismissing the application for judicial review: [2021] IEHC 254. Refusing leave to appeal to the Court of Appeal: [2021] IEHC 422; An Taisce v. An Bord Pleanála [2022] IESC 8 (Supreme Court, Hogan J, 16 February 2022)
505 Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 (High Court (Judicial Review), Holland J, 16 March 2022)
506 Kemper v An Bord Pleanála [2020] IEHC 601
507 Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 (High Court (Judicial Review), Holland J, 16 March 2022)
508 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019)
509 Emphases in original
510 McGrath Evidence 3rd Ed. 2020, Chapter 2 - The Burden of Proof §2.02 et seq; cited in Heather Hill #2
511 §2-02 fn2 citing Hutch v Dublin Corporation [1993] 3 IR 551 at 558 (per McCarthy J)).

Conclusion on Disputed Risk of Cement Leaching to Groundwater

281. For the reasons set out above, I hold that the question whether the occurrence of cement leaching to groundwater is a real risk in this case, such that failure to address it in AA is fatal to the Impugned Permission, is a question disputed by the respective experts such that, in the absence of cross-examination of the experts (Mr McGann and Mr Paul) who disputed that it is a real risk, the issue falls to be decided against ETI on the basis that it bears, and has failed to discharge, the light burden of proof of the reality of such risk.

282. And, as counsel for Cloncaragh points out[512], as the case was run, the issues raised by Dr Drew do not arise if there is, as I must take it, no real risk of cement leaching.

283. On that basis the challenge to the Impugned Permission based on failure to consider in AA the alleged risk of cement leaching must fail.

284. However, I should add that this finding, turning as it does on a question of burden of proof, does not amount to a finding binding anyone, in any future iteration of this planning process, to a view on whether cement leaching is or is not a real risk. Nor does this finding absolve the Board or the Council (in reporting to the Board) from any autonomous obligation to interrogate that issue. As I have pointed out, the obligations and processes of the court and the Board, as to the discernment of the reality of a posited risk, are quite different.

Risk to the SAC

285. It bears remembering that the issue in AA in this case is not, ultimately, whether cement will leach to groundwater during the construction of this development. Nor is it whether such leached cement will reach the Dooradoyle River and in what quantity. Neither is it by what factor will it be diluted in the Dooradoyle River en route to the SAC. These are important issues but not the ultimate issue. The ultimate issue is whether it has been shown beyond reasonable scientific doubt that the proposed development will not adversely affect the integrity of the SAC having regard to its qualifying interests and conservation objectives. The Board has found it has and is rebuttably presumed to have been correct in that regard.

286. Notably, and however light the burden on it, ETI has not attempted to address the issue of consequences of cement leaching for the integrity of the SAC by reference to its characteristics and specific environmental conditions, qualifying interests and conservation objectives. There has been no attempt by ETI to address *"the likelihood of harm occurring and the extent and nature of the anticipated harm".*[513]

287. Counsel for the Board argued[514] that any alleged doubt in AA "*has to be brought to bear on the whole purpose of habitats assessment; in other words, the Applicant has to tie it together with an*

512 Day 3 p201
513 See the excerpt from Heather Hill #2 above.
514 Day 3 p88

argument about how the conservation objective of the various European sites might be affected." Counsel for ETI[515] addressed the "*the argument that it[516] should have considered the conservation objectives, the Board says and the developer says that I need to show how the conservation objectives will be affected*". His response was that he "*hadn't looked at the conservation objectives, because he was focusing on the precise point of the lack of certainty, in circumstances where the other aspects of the impact are accepted*". The precise point to which he was referring was the alleged risk of the occurrence of cement leaching. And as to the other aspects I take, for the sake of argument, his point as to the hydrological link. But cement leaching was raised for the first time in the judicial review and was not raised with or addressed by the Board. So I do not think Counsel for ETI can say that it was accepted specifically of leached cement that, in whatever highly-diluted concentration (a dilution factor exceeding a factor of 2,900,000) via the 2.8km route in the ground and the Dooradoyle River it might reach the nearest point of the SAC, "*the likelihood of harm occurring and the extent and nature of the anticipated harm*" would be such that the test of proof beyond reasonable doubt of no adverse impact on the integrity of the SAC would be failed.

288. ETI's burden in addressing this issue was light but was not addressed at all. I reject Ground 3 on this account also.

CONCLUSIONS

289. For the reasons set out above, I will quash the Impugned Permission by reason of the Board's failure to circulate the ETI submission to the Planning Authority in a timely manner.

290. I dismiss ETI's complaint regarding the conflict between the engineers' and the architect's drawings as to the Basement FFL.

291. As to the AA issue, I exclude the dispute as to groundwater flow direction as not pleaded. That, in effect, leaves in the case on AA the issue whether there is a real risk of cement leaching and I have held against ETI in this regard. The case in that respect is dismissed.

292. The reasons grounds were pursued by ETI but were not the subject of much attention at trial. Given I will quash the Impugned Permission by reason of the Board's failure to circulate the ETI submission to the Planning Authority in a timely manner, even if the decision is remitted to a point in the process to remedy that error, the Board will have the opportunity to look again at its reasons in light of these proceedings, I see no need to decide the reasons' issues.

293. I will hear the parties as to the precise form of order to be made and as to costs. I will list this case for mention on 20 October 2022.

David Holland
3 October 2022

515 Day 3 p255
516 I think this should read "I".